

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

183

FOR MR. CHIEF JUSTICE MARSHALL

TRANSCRIPT OF RECORD

COURT OF APPEALS, DISTRICT OF COLUMBIA

OCTOBER TERM, 1928

606

David Burnett
Robert H. Lucas No. 4847

DAVID H. BLAIR, COMMISSIONER OF INTERNAL
REVENUE, APPELLANT

vs.

HENRIETTA D'ARAMON

APPEAL FROM THE BOARD OF TAX APPEALS

FILED OCTOBER 8, 1928

COURT OF APPEALS, DISTRICT OF COLUMBIA

OCTOBER TERM, 1928

No. 4847

DAVID H. BLAIR, COMMISSIONER OF INTERNAL
REVENUE, APPELLANT

vs.

HENRIETTA D'ARAMON

APPEAL FROM THE BOARD OF TAX APPEALS

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Docket 10644

HENRIETTA D'ARAMON (ALSO KNOWN AS COUNTESS PAUL D'ARAMON), petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

For taxpayer:

R. D. Coudert, Esq.
Thos. W. Kelly, Esq.
Blount Ralls, Esq.
R. W. Candler, Esq.
S. D. Bowers, Esq.

For Commr.:

T. P. Dudley, Esq.
A. H. Murray, Esq.

Docket entries

1926

- Jan. 5—Petition received and filed.
 “ 11—Copy of petition served on solicitor.
 “ 11—Notification of receipt mailed taxpayer.
 Feb. 13—Answer filed by solicitor.
 “ 20—Copy of answer served on taxpayer. Assigned to general calendar.
 Nov. 13—Stipulation to consolidate with 6243 filed. See 6243.
 “ 15—Stipulation to consolidate with 6243 and 13220 and advance hearing filed.
 Dec. 1—Hearing had before Mr. Milliken on merits. Petitioner's findings and brief due 1-15-27.
 “ 30—Transcript of hearing 12-1-26 filed.

1927

- Jan. 5—Motion for extension to 2-15-27 to file brief, filed by taxpayer. See 6243.
 “ 11—Ordered date for filing briefs be extended to 2-16-27. Signed and filed. Both sides notified.
 “ 15—Motion for extension to 2-15-27 to file brief, filed by G. C.
 “ 20—Granted. Both sides notified.
 Feb. 15—Motion for extension to 2-18-27 to file brief filed by taxpayer. Granted. Both sides notified.
 “ 15—Motion for an extension to 3-17-27 to file brief, filed by G. C.
 “ 17—Brief filed by taxpayer.
 “ 17—Granted. Both sides notified. See 6243.
 “ 18—Hearing date set for 4-20-27 (void).
 “ 21—Notice disregarding “hearing set for 2-18-27” proceeding was heard 12-1-26 in connection with 6243.

- Mar. 16—Motion for extension to 4-16-27 to file brief, filed by G. C.
See 6243.
- “ 18—Granted. Both sides notified.
- Apr. 14—Motion for an extension to 6-1-27 to file brief, filed by
G. C. See 6243.
- “ 15—Granted. Both sides notified.
- June 1—Brief filed by G. C.
- July 8—Findings of fact and opinion rendered. Judgment will
be entered on 15 days' notice #50. Both sides notified.
- Aug. 22—Notice of settlement filed by G. C.
- “ 24—Notice allowing taxpayer until 10-3-27 to file alternative
settlement for hearing 10-20-27. Failure to do so hear-
ing set 10-12-27.
- Oct. 12—Hearing had before Mr. Littleton on settlement, assigned
to Mr. Milliken for order.
- “ 13—Order and decision redetermining deficiency, signed and
filed. Both sides notified.
- 1928
- Apr. 7—Petition for review by Ct. of Appeals of D. C. with as-
signments of error filed by G. C.
- 2 “ 13—Proof of service filed by G. C.
- June 1—Motion for extension to July 8, 1928, for prepara-
tion of evidence and delivery of documents, filed
by G. C.
- “ 6—Order enlarging time to 7-8-28 for the preparation of evi-
dence and the delivery of record papers *sur* petition
for review in Cir. Ct. of Dis. of Col. entered.
- “ 26—Praecipe of record filed by G. C.
- “ 26—Statement of evidence lodged by G. C.
- “ 26—Motion for extension to 7-28-28 for settlement of record
and transmission filed by G. C.
- “ 29—Notice of hearing set for 7-11-28 on statement of evidence.
- “ 29—Order enlarging time to 7-28-28 for preparation of evi-
dence and transmission and delivery of papers *sur* peti-
tion entered.
- July 2—Proof of service of praecipe and statement of evidence for
hearing on July 10, 1928, filed by G. C.
- “ 7—Order enlarging time to 8-8-28 entered.
- “ 11—Hearing had before Mr. Green, continued to 8-8-28 on
approval of statement of evidence.
- “ 11—Order placing on cal. 8-8-28 for hearing on statement of
evidence entered.
- “ 24—Order enlarging time to 8-22-28 for preparation of evi-
dence and transmission of record *sur* petition entered.
- Aug. 8—Hearing had before Mr. Sternhagen on approval of state-
ment of evidence, continued to Aug. 22, 1928. Respond-
ent's motion for 10 days additional time to submit record,
granted.
- “ 8—Order of continuance to 8-22-28 entered.
- “ 13—Order enlarging time to 9-1-28 entered.
- “ 22—Motion for extension to Sept. 22, 1928, for preparation of
evidence, transmission and delivery of record papers filed
by G. C.
- “ 22—Order enlarging time to Sept. 22, 1928, entered.

Sept. 21—Statement of evidence approved and ordered filed.

“ 21—Order enlarging time to 10-8-28 for filing certified copies of record *sur* petition.

Now, October 4, 1928, the foregoing docket entries certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

3 Filed January 5, 1926. United States Board of Tax Appeals.
Appeal of HENRIETTA D'ARAMON (also known as Countess Paul d'Aramon), % Robert W. Candler, 48 Wall Street, New York City, N. Y. Docket No.

Petition

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter dated November 6, 1925 (no bureau symbols), and as the basis of her appeal sets forth the following:

1. The taxpayer is a nonresident alien, being a citizen of the Republic of France, and residing at No. 1 Boulevard La Tour, Maubourg, Paris, France, and she may be addressed in the United States, % Robert W. Candler, No. 48 Wall Street, New York City, N. Y.

2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer on November 6, 1925.

3. The taxes in controversy are income taxes for the calendar year 1923 (Account No. 650423, Form 1040-B) and are less than
4 \$10,000.00, to wit, six hundred thirty (\$630.00) dollars.

4. The determination of tax contained in said deficiency letter is based upon the following errors:

a. That the commissioner erroneously proposes to make an assessment against the taxpayer by reason of the fact that she received an annuity of ten thousand (\$10,000.00) dollars under the will of the late James Gordon Bennett which she failed to report as taxable income.

b. The Commissioner of Internal Revenue erroneously claims that periodical payments of an annuity created by the will of a deceased person are taxable income in full to the annuitant, a distinction being recognized by the bureau between the value of the right to receive an annuity, which is the property which passes by bequest, and the actual annual payments to the annuitant growing out of this right, which are income.

5. The facts upon which the taxpayer relies as to the basis of her appeal are as follows:

a. James Gordon Bennett, a citizen of the United States of America and resident of the State of New York, died in the Republic of France on May 14, 1918, leaving a last will and testament dated November 11, 1916.

b. The said last will and testament was duly admitted to probate by the Surrogates' Court in and for the County of New York,
5 State of New York, to whom jurisdiction in that behalf belonged on September 27, 1919.

c. Rodman Wanamaker and Guaranty Trust Company of New York are the duly qualified and acting executors of said last will and testament.

d. The said last will and testament contains the following provision:

"Seventh. I give and bequeath to my niece Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars to be paid to her personally and upon her individual receipt in equal semi-annual payments in each year during her life, reckoning the years from the time of my death."

By the twenty-ninth clause of his will the said decedent directed the incorporation by his executors of a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists," the purpose of which is to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least 10 years on any daily newspaper or journal than or thereafter published in the Borough of Manhattan, in the city of New York, and who are unable to care for themselves, or need such home or aid, and he gave all the residue of his estate to said corporation. Said decedent further provided by the thirtieth clause of his will as follows:

"For the purpose of paying any legacy or legacies or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property and
6 to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other dispositions into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged, shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto.

"I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

e. The corporation above referred to, viz, The James Gordon Bennett Memorial Home for New York Journalists Corporation, was duly incorporated and is a charitable corporation incorporated under the laws of the State of New York with the approval of the State board of charities in May, 1919, and is now existing under the laws of the State of New York.

f. No trust or fund was directed by the said will to be or has been set up by the said executors of the said will of James Gordon Bennett to provide for the payment of the bequest, legacy, or annuity to said taxpayer under the fifth clause of said will.

g. The taxpayer in filing her nonresident income-tax return, Form 1040-B, for the year 1923 set forth that she had been paid in 1923

the sum of ten thousand (\$10,000.00) dollars on account of her annuity and that she was advised by counsel that said annuity was a legacy and not income taxable to her.

6. The taxpayer in support of her appeal relies upon the following propositions of law:

7 a. That the said annuity of ten thousand (\$10,000.00) dollars paid by said executors to the taxpayer in 1923 was or is property acquired by bequest and as such was and is not taxable as income.

b. The gift, bequest, or legacy set forth in the seventh clause of said will was not and is not a gift of income, nor was nor is the sum or sums paid by the executors to the taxpayer for such annuity nor any part thereof income which is subject to taxation.

c. The annuity mentioned in the seventh clause of said will is a bequest or legacy payable in installments, and as such was not and is not taxable as income.

d. The said bequest or legacy does not constitute a trust the income of which is distributed periodically; and it does not fall within the terms of section 345 of regulations 62, nor within the terms of the revenue act of 1921.

e. The gift, bequest, legacy, or annuity contained in the seventh clause of said will is, when and as received by said taxpayer, principal and not income, and is not subject to tax under the sixteenth amendment of the Constitution of the United States, and any tax or attempt to tax such gift, bequest, legacy, or annuity is and will be unconstitutional and void and in violation of sections eight and nine of Article I of said Constitution.

8 f. The fact that said executors may pay said gift, bequest, legacy, or annuity from funds in their hands partly or wholly derived from income collected by them on the assets of the estate, does not thereby alter the nature of said gift, bequest, or legacy, nor render it or any part thereof income in the hands of the taxpayer.

Wherefore the taxpayer respectfully prays that this board may hear and determine this appeal.

ROBERT W. CANDLER,

Counsel for taxpayer, 48 Wall Street, New York City, N. Y.

THOMAS GARRETT, Jr.,

Counsel for taxpayer, 15 Broad Street, New York City, N. Y.

9 STATE OF NEW YORK,
County of New York, ss:

Robert W. Candler, being duly sworn, says that he is one of the duly appointed attorneys in fact of Henrietta d'Aramon, the taxpayer above named, and as such is duly authorized to verify the foregoing petition; that he has read the said petition and is familiar with the statements therein contained, and that the facts therein stated are true except such facts as are stated to be upon information and belief, and that as to those facts he believes it to be true.

Deponent further says that the grounds of his knowledge and his belief as to all facts not stated upon his knowledge are: That he, in a legal and trust capacity, has been connected with said Henrietta d'Aramon and various members of her family for many years, and

on behalf of said taxpayer has been in communication with the office of the Commissioner of Internal Revenue for several months past in respect to said additional assessment now sought to be reviewed; that he is also one of the counsel for the executors of James Gordon Bennett, deceased, mentioned in said petition, and is familiar with the facts in connection with the payments of said annuity; and that the reason that this verification is made by deponent and not by said taxpayer is because the said taxpayer is at present absent from the United States, and to the best of deponent's information and belief is in France.

ROBERT W. CANDLER.

Sworn to before me this fourth day of January, 1926.

ANTHONY VEVERKA,

Notary Public, Bronx Co., N. Y. Co. No. 87.

Term expires March 30, 1927.

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TREASURY DEPARTMENT,
Washington, Nov. 6, 1925.

Countess PAUL D'ARAMON,

% R. W. Candler, 48 Wall Street, New York, New York.

MADAM: Reference is made to your protest, filed by your attorney, Mr. Robert W. Candler, 48 Wall Street, New York, New York, against a proposed assessment of income taxes by the collector of internal revenue, New York, New York, as a result of investigation of your income tax liability for the calendar year 1923 (Account #650423—Form 1040-B).

You are advised that all facts and arguments presented in connection with your protest have been given careful consideration by this office. It appears that the assessment is proposed by reason of the fact that you received an annuity of \$10,000.00 under the will of the late James Gordon Bennett, which you failed to report as taxable income.

The facts appear as follows:

James Gordon Bennett, a citizen of the United States, died on or about May 14, 1918, leaving a will which provided as follows:

"Seventh: I give and bequeath to my niece Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars to be paid her personally and upon her individual receipt in equal semi-annual payments in each year during her life, reckoning the years from the date of my death."

By the 29th clause of his will the decedent directed the incorporation by his executors of a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists," the purpose of which is to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years on newspapers or journals published in the Borough of Manhattan, New York City, and who are unable to care for themselves, and he gave all the residue of his estate to said corporation.

The decedent further provided by the 15th clause of his will as follows:

"For the purpose of paying any legacy or legacies or satisfying or providing for the payment of any of my debts or obligations or

of any annuity or annuities or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death, or which at any time may belong to or form a part of my estate and property. * * * and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto.

"I authorize and empower my executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

The corporation above referred to, viz, the James Gordon Bennett Memorial Home for New York Journalists Corporation, is a charitable corporation incorporated under the laws of the State of New York with the approval of the State board of charities in May, 1919, and is now existing under the laws of the State of New York, and is exempt from income tax under the provisions of section 231 (6) of the revenue act of 1921.

It is contended that the sum of \$10,000.00 paid by the said executors to Countess Paul d'Aramon in 1923 is not taxable income because it is property acquired by bequest within the terms of section 213 (b) (3) of the revenue act of 1921, which exempts from the income tax "the value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income)," it being argued that the said \$10,000.00 payable each year is not required to be paid out of the income of any specific fund or from the income of the estate generally, but is a bequest of a definite sum of money from the said estate, payable in any event, whether there is income or not, and, therefore, constitutes a distributive share of the estate, exempt from tax under section 213 (b) (3).

You are advised that the periodical payments of an annuity created by the will of a deceased person are taxable income in full to the annuitant, a distinction being recognized by the bureau between the value of the right to receive the annuity, which is the property which passes by bequest, and the actual annual payments to the annuitant growing out of this right, which are income.

In view of the above, the action of the collector is sustained. The amount and computation of the deficiency are as follows:

Net income-----	\$10,000.00
Tax at 8%-----	800.00
Surtax on \$10,000.00-----	40.00
Total tax-----	840.00
Less: 25% reduction (for 1923)-----	210.00
Additional tax due-----	630.00

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed sixty days from the date of mailing of this letter within which to file an appeal to the United States Board of

Tax Appeals, contesting in whole or in part the correctness of this determination. If an appeal is filed it should be addressed to "United States Board of Tax Appeals, Earle Building, 13th and E Streets, N. W., Washington, D. C."

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the enclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:RR:EBP. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items to which you agree.

13 Respectfully,

D. H. BLAIR, *Commissioner.*

Enclosures:

Agreement Form A.
Form 882.

Now, October 4, 1928, the foregoing petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

14. (Stamped:) Filed February 13, 1926, United States Board of Tax Appeals.

United States Board of Tax Appeals

Appeal of Henrietta D'Aramon (also known as Countess Paul d'Aramon), c/o Robert W. Candler, 48 Wall Street, New York, N. Y. Docket No. 10644

Answer

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

(1) Admits the allegations contained in paragraph 1 of the petition.

(2) Admits that a deficiency letter was mailed the taxpayer on November 6, 1925, and states a deficiency tax for the year 1923 in the amount of \$630.00.

(3) Admits the allegations contained in subdivisions (a), (b), and (c) of paragraph 5 of the petition.

(4) For lack of information denies the allegations contained in subdivisions (e) and (f) of paragraph 5 of the petition.

(5) Admits the material allegations of fact contained in subdivision (g) of paragraph 5 of the petition.

(6) Admits that the deficiency tax results from the ruling by the commissioner that an amount of \$10,000.00 paid to the taxpayer during the year 1923 as an annuity constituted taxable income.

(7) Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

PROPOSITIONS OF LAW

15 The item in controversy of \$10,000.00 constitutes taxable income to the taxpayer and is properly includable in gross income for the year 1923 under the provisions of the revenue act of 1921.

Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.

Of counsel:

D. D. SHEPARD,
Special Attorney, Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing answer certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

16 A true copy. Teste.

B. D. Gamble,
Clerk U. S. Board of Tax Appeals.

United States Board of Tax Appeals

Ronald De Reuter, petitioner, v. Commissioner of Internal Revenue, respondent.

Henrietta D'Aramon, petitioner, v. Commissioner of Internal Revenue respondent.

Sybil Whitehouse, petitioner, v. Commissioner of Internal Revenue, respondent.

Docket Nos. 6243, 10644, 13220. Promulgated July 8, 1927

Where the testator bequeathed to petitioner an annuity and where his will contained no direction to pay the annuity out of the income of his estate; *held*, that the moneys received by petitioner as payments of his annuity is exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

Frederick R. Coudert, Esq., Thomas Kelly, Esq., Blount Ralls, Esq., Robert W. Candler, Esq., and S. D. Bowers, Esq., for the petitioners; *Thomas P. Dudley, jr., Esq.,* for the respondent.

The above proceedings were, by agreement, consolidated and heard together and involve deficiencies in income tax in the case of Ronald De Reuter, for the calendar year 1923, in the sum of \$1,470; in the case of Henrietta D'Aramon, for the calendar year 1923, in the sum of \$630; and in the case of Sybil Whitehouse, for the calendar year 1921, in the sum of \$920.79. These deficiencies arise by reason of the fact that the commissioner included in gross income for each petitioner a certain annuity bequeathed to petitioner by the will of James Gordon Bennett. Petitioner Sybil Whitehouse further contends that the commissioner erred in not permitting the deduction of certain death taxes paid by the estate of James Gordon Bennett to the States of New York, New Jersey, and Rhode Island. In a brief filed in behalf of said petitioner, this last contention has been withdrawn.

Findings of fact

The petitioner Ronald De Reuter is a nonresident alien, a citizen of France, and resides at 37 Avenue d'Iona, Paris, France. Petitioner Henrietta D'Aramon is a nonresident alien, a citizen of France, resident at No. 1 Boulevard La Tour, Maubourg, Paris, France. Petitioner Sybil Whitehouse is a resident of the city of Newport, Rhode Island, and her principal place of business is at Stone Villa, Newport, Rhode Island.

James Gordon Bennett, a citizen of the United States and a resident of the State of New York, died in the Republic of France, May 24, 1918, leaving a last will and testament, the material portions of which are:

"Third: I give and bequeath to my wife, Maud, an annuity of fifty thousand dollars to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death, and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

"Fourth: I give and bequeath unto my sister, Jeannette Bell, the sum of fifty thousand dollars and make no further provision for her, because she is already amply provided for.

"Fifth: I give and bequeath unto my nephew, Isaac Bell, an annuity of thirty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

"Sixth: I give and bequeath to my niece, Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semiannual payments in each year during her life, reckoning the years from the time of my death.

"Seventh: I give and bequeath to my niece, Henrietta, wife of Count Paul D'Aramon, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

"Eighth: I give and bequeath to my stepson, Ronald De
18 Reuter, an annuity of twenty thousand dollars, to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

"Ninth: I give and devise absolutely and in fee simple, to Sybil Douglas, wife of William Whitehouse, my cottage or stone villa, consisting of a parcel of land and buildings thereon, situated at Newport, in the State of Rhode Island, known as Stone Villa to have and to hold the same to her, her heirs, and assigns forever; and if during my life I shall sell the said cottage, then and in such case I give and bequeath unto the said Sybil Douglas, wife of William Whitehouse, a sum equal to the amount for which I shall have sold the said cottage.

"Tenth: I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

By the eleventh to twenty-fifth clauses, inclusive, the testator bequeaths annuities ranging from \$500 to \$5,000 to various persons. Then follows:

"All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semiannual payments reckoning from the time of my death.

"Twenty-sixth: I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

"Twenty-ninth: It is my long-cherished intention and purpose and it is my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the New York Herald, and therefore to that end and to effectuate my said intention and purpose I direct the executors of this my will hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists" in memory of my father and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the Borough of Manhattan in the city of New York and who shall by reason
19 of old age, accident, or bodily infirmity, and through lack of means be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval, and acceptance of persons to receive the benefits of such home or such aid, give the preference to any person who shall be or shall have been employed by or associated with the New York Herald Company or the New York Herald Company Société Anonyme Française upon or in connection with either the New York or the European edition of the New York Herald newspaper or the Evening Telegram newspaper. The said Memorial Home Corporation shall establish and maintain a suitable building or suitable buildings and grounds and appurtenances to provide a home or homes for the persons so to be benefited or aided and may also aid any such person or persons by pecuniary or other contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise, and bequeath all the rest, residue, and remainder of all the estate and property real and personal and of every kind and nature and wheresoever situated which shall belong to me or be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and

as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such Home Corporation shall be so duly incorporated and entitled to receive such residuary estate and property, I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such Memorial Home Corporation shall own and as soon as the due administration of my estate shall permit, receive and that it shall hold as long as practicable all capital stock of the New York Herald Company and the New York Herald Company Société Anonyme Française which shall belong to me at my death and form part of my residuary estate and property, and that by virtue of its ownership of such stock, it shall from time to time elect such persons as directors of said The New York Herald Company and said The New York Herald Company Société Anonyme Française as shall continue to manage each of said companies and conduct the business and publication and management of the New York Herald newspaper in both its New York and European editions and the Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable, as the same shall be conducted at the time of my death. It is also my wish and hope and I request

20 that the directors of said New York Herald corporations shall so manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations or either of them as shall provide reserve or surplus funds sufficient in their judgment to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will hereafter named and each persons who may at any time be an executor of my will, shall be and act as a director of such Memorial Home Corporation and a director of each of said corporations the New York Herald Company and the New York Herald Company Société Anonyme Française. It is also my will and I direct that each executor of this my will who shall act as a director of such Memorial Home Corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in addition to any commissions or compensations which he may receive or be entitled to for his services as an executor of this will.

“Thirtieth: I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executor of this my will, and that each such executor may

Findings of fact

The petitioner Ronald De Reuter is a nonresident alien, a citizen of France, and resides at 37 Avenue d'Iona, Paris, France. Petitioner Henrietta D'Aramon is a nonresident alien, a citizen of France, resident at No. 1 Boulevard La Tour, Maubourg, Paris, France. Petitioner Sybil Whitehouse is a resident of the city of Newport, Rhode Island, and her principal place of business is at Stone Villa, Newport, Rhode Island.

James Gordon Bennett, a citizen of the United States and a resident of the State of New York, died in the Republic of France, May 24, 1918, leaving a last will and testament, the material portions of which are:

"Third: I give and bequeath to my wife, Maud, an annuity of fifty thousand dollars to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death, and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

"Fourth: I give and bequeath unto my sister, Jeannette Bell, the sum of fifty thousand dollars and make no further provision for her, because she is already amply provided for.

"Fifth: I give and bequeath unto my nephew, Isaac Bell, an annuity of thirty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

"Sixth: I give and bequeath to my niece, Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semiannual payments in each year during her life, reckoning the years from the time of my death.

"Seventh: I give and bequeath to my niece, Henrietta, wife of Count Paul D'Aramon, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semi-annual payments in each year during her life, reckoning the years from the time of my death.

"Eighth: I give and bequeath to my stepson, Ronald De
18 Reuter, an annuity of twenty thousand dollars, to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

"Ninth: I give and devise absolutely and in fee simple, to Sybil Douglas, wife of William Whitehouse, my cottage or stone villa, consisting of a parcel of land and buildings thereon, situated at Newport, in the State of Rhode Island, known as Stone Villa to have and to hold the same to her, her heirs, and assigns forever; and if during my life I shall sell the said cottage, then and in such case I give and bequeath unto the said Sybil Douglas, wife of William Whitehouse, a sum equal to the amount for which I shall have sold the said cottage.

"Tenth: I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

By the eleventh to twenty-fifth clauses, inclusive, the testator bequeaths annuities ranging from \$500 to \$5,000 to various persons. Then follows:

as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such Home Corporation shall be so duly incorporated and entitled to receive such residuary estate and property, I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such Memorial Home Corporation shall own and as soon as the due administration of my estate shall permit, receive and that it shall hold as long as practicable all capital stock of the New York Herald Company and the New York Herald Company Société Anonyme Française which shall belong to me at my death and form part of my residuary estate and property, and that by virtue of its ownership of such stock, it shall from time to time elect such persons as directors of said The New York Herald Company and said The New York Herald Company Société Anonyme Française as shall continue to manage each of said companies and conduct the business and publication and management of the New York Herald newspaper in both its New York and European editions and the Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable, as the same shall be conducted at the time of my death. It is also my wish and hope and I request

20 that the directors of said New York Herald corporations shall so manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations or either of them as shall provide reserve or surplus funds sufficient in their judgment to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will hereafter named and each persons who may at any time be an executor of my will, shall be and act as a director of such Memorial Home Corporation and a director of each of said corporations the New York Herald Company and the New York Herald Company Société Anonyme Française. It is also my will and I direct that each executor of this my will who shall act as a director of such Memorial Home Corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in addition to any commissions or compensations which he may receive or be entitled to for his services as an executor of this will.

“Thirtieth: I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executor of this my will, and that each such executor may

be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will, or for the administration of my estate, or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto. I authorize and empower said executors or executor to retain and hold

21 any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me.

I especially request and charge said executors and executor not to sell or part with any of the capital stock of the New York Herald Company or the New York Herald Company Société Anonyme Française unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said Memorial Home Corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will."

All the annuities involved in these proceedings, to wit, those paid the petitioners, Ronald De Reuter and Henrietta D'Aramon, in the year 1923, and to Sybil Whitehouse in the year 1921, were paid by executors of the will of James Gordon Bennett out of the income of the estate. In November, 1921, the executors of the will of James Gordon Bennett filed in the Surrogate's Court for the County of New York, State of New York, an intermediate account of settlement which was thereafter approved by said court. That account showed that all of the annuities herein involved were, prior to November 14, 1920, paid out of the corpus of the estate and all such annuities were, on and after November 14, 1920, paid out of the income of the estate. The total amount of the annuities payable in 1920 was \$144,000. The account of settlement shows that the executors, on December 30, 1920, permanently set aside to the James Gordon Bennett Memorial Home for New York Journalists Corporation, which was organized under the laws of New York in May, 1919, the residuary devisee and legatee under said will, but subject to taxes, annuities, and other charges, the following assets:

22	Promissory notes of Frank A. Munsey Co.....	\$2,000,000.00
	Bonds and mortgages on Fort Washington property, balance of principal due thereon.....	1,097,990.00
	Bond and mortgage of Norman Countryman, balance of principal due thereon.....	450.00
	\$34,900 U. S. Victory loan bonds, amount invested therein.....	34,741.24
	Balance of cash uninvested.....	78.76
	Total.....	3,133,260.00

Opinion

MILLIKEN: In view of the conclusion which we have reached, we find it necessary to discuss but one question and that is, whether the annuities received by the petitioners under the will of James Gordon Bennett constitute income which is taxable by reason of the provisions of the reveue act of 1921. The applicable provisions of that act are:

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

"(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

"(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income). * * *

"Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

23 "(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust

shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

The question presented is whether the annuity received by each of the petitioners was a "bequest" which was exempt from income tax under section 213, or constituted distributive income which was taxable under section 219. This question depends upon the construction of the will of James Gordon Bennett. The seventh, eighth, and tenth clauses of that will bequeathed to the respective petitioners "an annuity." No limit is placed upon the payment of these annuities. The only direction is that they be paid. The whole estate is charged with their payment. The only way in which any part of the estate can be freed from this charge is found in the thirtieth clause where

24 the executors are given the power to convert property into money and where it is provided that the property "so sold, conveyed, * * * or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this, my will, or any codicil thereto." It is to be noted, however, that this very power of sale or conversion is given to the executors for, among other purposes, the payment of the annuities. So that while the property sold is free of the charge, it is clear that the proceeds remain subject to the payment of the annuities.

Respondent invites our attention to the following excerpt from the thirtieth clause:

"I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

Giving this provision its broadest construction, it is apparent that there is nothing therein to the effect that any annuity is payable out of the income of the personalty so to be set apart. If such fund, if created, should fail, it is our opinion that the remaining corpus of the estate would remain liable for the satisfaction of the annuities. In those cases where it was the clear intention of a testator that an annuity should be paid out of income or out of a particular fund, such intention must be given full effect. See *Delaney v. Van Aulen*, 84 N. Y. 16, and *Irwin v. Wollpert*, 128 Ill. 527; 21 N. E. 501. On the other hand, where an annuity is given without limitation and the will merely indicates that the annuity may

be paid out of income, the corpus is liable when the income becomes insufficient. Thus, it was said by Judge Denio in *Pierrpont v. Edwards*, 25 N. Y. 128:

25 "The only question which I think it necessary to consider, in this case, is whether the bequest of the annuity of \$7,000 a year, to the testator's wife, was specific, in the sense that if it could not be paid out of the fund indicated—namely, the income of the trust estate—it was to fail, or to abate, in proportion that the indicated fund should prove deficient; or, on the other hand, whether it was intended by the testator that it should be paid; at all events the income of his property given to the trustees being pointed out by way, it is called, of demonstration. I am of opinion that the last-mentioned construction is the one which we are bound to place upon the instrument, * * *. The leading principle of the cases is that when the testator bequeaths a sum of money, or which is the same thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund." (Sir James Wigram in *Dickin v. Edwards*, 4 Hare. 273.)

Reading the will of James Gordon Bennett as a whole, it at once becomes apparent that the annuities which it bequeaths are charges upon its whole estate, income, personalty, and realty. The James Gordon Bennett Memorial Home is a residuary legatee and devisee, and gets only what may be left after the annuity charges are paid.

That the annuities provided by the will are in fact bequests seems clear. See *Pierrpont v. Edwards*, *supra*; *Clark v. Clark*, 147 N. Y. 639; 42 N. E. 275; *Canal Bank v. Hudson*, 111 U. S. 66; 3 C. J. 202.

Are these annuities bequests of income within the meaning of section 219, or are they bequests as that term is used in section 213?

Long before the sixteenth amendment to the Constitution became effective, a broad distinction had been drawn between a bequest of a pure annuity and a bequest of income. Thus, it is said in section 2 of Chapter XIII of Remsen on the Preparation and Contest of Wills (1907):

26 "An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.

"Annual taxes on principal are deducted from a use or income but not from annuities. * * *

"Where the testator sets aside a fund to provide for the payment of an annuity, his will should clearly indicate whether he intends the annuity to be a charge on the corpus or payable only out of the income. Thus, under 'a clear gift of an annuity, a direction to set a fund apart to secure it, which is to fall into the residue upon the death of the annuitant,' the corpus is still liable to make good arrears. 'But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the corpus, and it is a simple case of tenant for life and remaindermen.' So if it is clear that the annuity is to be paid only out of the income each year, or that the

corpus is to be looked upon as an entirety after the annuitant's death, the corpus will not be liable for arrears. In the absence of an expressed intent to the contrary, the testator's personal estate is primarily liable for the payment of an annuity. In some States it is provided by statute that, if the funds or property out of which annuities are payable fails, resort may be had to the general assets, as in case of a general legacy. Some testators provide for the purchase of annuities; some create a trust for their payment; others simply direct their payment out of the estate."

In *Peck v. Kinney* (C. C. A.), 143 Fed. 76, it is said:

"There is this distinction between income and an annuity. The former embraces only the net profits after deducting all necessary expenses and charges; the latter is a fixed amount directed to be paid absolutely and without contingency. *Ex parte McComb*, 4 Bradf. Sur. (N. Y. 151, 152. 'An annuity is defined as "a stated sum, payable annually" (*Pearson v. Chace*, 10 R. I. 455), or as "a yearly payment of a certain sum of money granted to another in fee, for life, or for years." *Kearney v. Cruikshank*, 117 N. Y. 95, 22 N. E. 580; *Bartlett v. Slater*, 53 Conn. 102, 2 Atl. 678, 55 Am. Rep. 73.' *Goodyear Shoe Machinery Co. v. Dancel*, 119 Fed. 692, 56 C. C. A. 300. It is a grant of a certain sum of money payable at the expiration of fixed, consecutive periods, for a definite term or for life. Lumley's Law of Annuities, 1."

27 The court then quotes from the oft-cited case of *Booth v. Ammerman*, 4th Bradford, 129. From the last case we make the following excerpt:

"An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount varying according to the income or profits, though a certain fund may be provided out of which it is to be payable. * * * The income or interest of a certain fund is not an annuity but simply profits of certain property, to be earned, which may vary more or less."

To the same effect see *Dulaney v. Dulaney*, 105 Va. 429; 54 S. E. 40, and *Overton v. Lea*, 108 Tenn. 505; 68 S. W. 250.

From the above, three things become apparent: (1) That each annuity herein involved is in fact a bequest; (2) that these annuities do not constitute bequests of income; and (3) that each annuity is a charge upon the whole estate.

Since no income, nor any share of income, has been bequeathed to any one of the petitioners, it can not be held that such petitioner was entitled to a "distributive share of the income of the estate or trust," which is taxable under section 219. We can not see that the fact that the number of years during which a legacy is payable is determinable by the life of the beneficiary makes that income which otherwise is not income.

Respondent contends that these proceedings are governed by *Irwin v. Gavit*, 268 U. S. 161, and *Heiner v. Beatty*, 17 Fed. (2d) 743. In our opinion these cases are not in point. In the *Gavit* case there was a bequest of a certain share of income arising from a certain trust fund. In these proceedings we have no bequests of income but a bequest of a sum certain, payable at all events each year so long as the legatee lives. In the *Beatty* case the testator, Carnegie, did be-

queath an annuity, but he made the annuity payable (in the case the executors did not purchase it from an insurance company) out
 28 of the income of a trust fund. The Circuit Court of Appeals reversed the decree of two judges of the lower court (10 Fed. (2d) 390) holding the annuity exempt from income tax, but in so doing placed their decision squarely on the ground that the bequest was one of income from a trust. Thus the appellate court said:

"The first part of the Carnegie will with which we are concerned is the fifth article. It reads as follows:

"Fifth: I give to each of the persons hereinafter in this fifth article named an annuity of the annual amount in this fifth article set after his or her name, to be paid semiannually during the annuitant's life, that is to say, to * * * Mr. Beatty Art-Dept wife succeeding five thousand dollars."

"If the will had stopped there, it is possible the testator's provision for John W. Beatty would have been a bequest, payable in semi-annual installments directly from the estate, and all payments made to him year by year would have been exempt from taxation under paragraph 3 of subdivision (b) of section 213 of the cited act (Comp. Stat. § 6336 1/8ff). However, the will did not stop there, but, going on, it provided in the very next article, by words whose significance we have emphasized by italics, as follows:

"Sixth: I direct my executor and *trustee* either to *set apart, hold in trust, invest and keep invested, in separate funds, one for each annuitant*, sufficient sums to *produce* by the clear net interest and *income* thereof, respectively, the several annuities provided in the fifth article of this will, * * * and to pay the said several annuities *from the interest and income of the respective funds* in semi-annual payments, *or* to purchase such annuities in life insurance companies. * * *

"By the eighth article the testator authorized his executor and trustee (who is one corporate person), 'in its discretion, to retain for investment of the principal of any of the *trusts*, herein provided for, any of the securities left by me.' And, finally, by the same article he authorized the executor and trustee to sell any of the securities coming into its hands and reinvest the proceeds.

"Recapitulating, these provisions created, somewhat inartificially, yet, we think with no lack of certainty, out and out trusts. They provided a capital sum for each annuitant, directed that it be "set apart" and "held in trust" for him and that from the interest and income therefrom accruing payment of a definite sum to be made to him semiannually. Having all the earmarks of formal trusts, the executor and trustee, believing itself charged therewith, exercised the election given it to create capital trust funds by withdrawing from the body of the estate sufficient securities to produce the amounts to be paid annually to the more than forty annuitants. For John W. Beatty it took, 'set apart' and 'held in trust' one \$100,000 United States Steel Corporation registered 50-year 5-per-cent gold bond and two \$5,000 bonds of the same issue, and of the interest
 29 received therefrom it paid him \$5,000 a year. This is what was done. But the testator directed, in the alternative and at the trustee's election, another way by which the trustee could provide for the payment of the annuities, namely; by taking a part

of the principal of the estate and with it buy annuities. Thus, in both ways the testator willed that parts of the corpus of his estate be appropriated as capital sums from which income in amounts sufficient to pay the annuities could be obtained. In neither way—indeed, nowhere in the will—did he provide for payment of annuities from the principal of his estate. In other words, the testator, through alternative ways, specifically indicated and fully provided the sources of income to be paid the annuitants. What the will intended the annuitant here to receive and what actually he did receive was the income derived from a source which we think is sufficiently definite to fall within the statute's denomination of 'income derived from any source whatever.'"

We look in vain for a provision in the Bennett will similar to that in the Carnegie will. We find no bequest of income.

Respondent cites *Cummings' Executor v. Cummings*, 146 Mass. 501; 16 N. E. 401, to the effect that annuities such as those before us are payable primarily from income. The same would be true of any legacy, for no court would permit an executor to sell property to pay a legacy if he had income available. So also such a legacy is payable out of personalty rather than realty. All these are matters of administration with which annuitants have no concern.

Next, it is contended that since the annuities were paid in the taxable years involved, from income, the annuities constitute income. It may be noted that during the first two years after Bennett's death, all the annuities herein involved were paid out of the corpus of the estate. The same, for all we know, may be done later. It is because certain testators have thought that they had ample means to pay annuities and their expectations have failed, that the cases which we have cited, have arisen. The fact that income is used to pay an obligation does not necessarily make what was income to the payor, in-

30 come to the payee. The payment by one from his salary of borrowed money without interest, does not make the money so paid income to the recipient. Neither would the payment of a simple legacy from income of an estate, make the legacy taxable as income.

Respondent calls our attention to the language of Mr. Justice Holmes in *Irwin v. Gavit*, *supra*, where he states that if the income therein involved was not taxable, Congress "has missed so much of the general purpose that it expresses at the start." We have not before us the question of the extent to which the income of the estate of James Gordon Bennett is taxable, and express no opinion on that question. All we have before us is whether these annuities constitute taxable income in the hands of the beneficiaries. But even if our decision should result in this income becoming nontaxable at all events, we can only say that this results from the provisions of the law. The Supreme Court, construing the same act that was construed in the *Gavit* case, held in *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602, that income received by a trustee to be accumulated for unborn and unascertained beneficiaries, was not taxable.

We are aware that the British courts have held that annuities similar to those here involved, are subject to the British income tax, but in *Merchants Loan & Trust Co. v. Smietanka*, 255 U. S. 509, it was said:

"The British income-tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved."

We have for application, sections 213 and 219 of the revenue act of 1921. It is only by a strained construction that we can by any possible means arrive at the conclusion that these annuities are taxable under section 219, to the petitioners, as distributive income.

On the other hand, section 213 grants an exemption in cases of bequests. There is no doubt that each of these annuities is a bequest and there is no doubt that none of them is made payable by the will of James Gordon Bennett, out of income. To hold that the mere fact that in the taxable years involved, the annuities were paid out of income and therefore were distributive income to the recipients, would give a construction to the taxing statute far beyond the meaning of the words used. When we are compelled to choose between clear words of exemption and a strained construction of a taxing provision, we accept that which is clear rather than that which involves doubt.

Judgment will be entered on 15 days' notice, under Rule 50. SMITH, dissenting: I perceive no valid distinction between this case and that of *Irwin v. Gavit*, 268 U. S. 161. That case arose under the revenue act of 1913, which imposed an income tax upon income "arising or accruing from all sources" and included "the income from but not the value of property acquired by gift, bequest, devise, or descent." During the years 1913, 1914, and 1915 Gavit received the income from a certain fund as a bequest. The court held that it was liable to income tax and said:

"But we think that the provision of the act that exempts bequests assumes the *gift of a corpus* and contrasts it with the income arising from it, but was not intended to exempt income properly so called simply because of the severance between it and the principal fund * * *. The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee." (*Italics ours.*)

If the gift of a corpus is the "bequest" that is not liable to income tax, then the petitioners in the case at bar did not receive a bequest. They simply received an annuity which, during the taxable year, was paid from the income of the estate. Clearly, under section 219 (d) of the revenue act of 1921, the fiduciary making the estate income-tax return was entitled to deduct from gross income the amount of the annuity paid to each of the petitioners during the taxable year. Under the decision of the board neither the fiduciary nor the beneficiary can be held liable to income tax in respect of the income received.

Furthermore, under the decision of the court in *Irwin v. Gavit*, *supra*, the petitioners in the case at bar had an interest in the estate of the decedent, and the income from that interest is liable to income tax the same as the income which Gavit received in the above-cited case.

Now, October 4, 1928, the foregoing findings of fact, opinion, and dissenting opinion certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

33

United States Board of Tax Appeals

HENRIETTA D'ARAMON, PETITIONER	}	Docket No. 10644
v.		
COMMISSIONER OF INTERNAL REVENUE, RESPONDENT		

Order and decision redetermining deficiency

Pursuant to the decision of the board promulgated July 8, 1927, in the above-entitled proceeding, the commissioner having filed a proposed final determination with notice of settlement, and the petitioner having made no objection to such proposed determination it is

Ordered, adjudged, and decided, that there is no deficiency in tax for the year 1923.

Dated, Washington, D. C., October 13, 1927.

(Signed) B. H. LITTLETON,
Chairman, United States Board of Tax Appeals.

True copy. Testa.

Now, October 4, 1928, the foregoing order of redetermination certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

34 (Stamped:) Filed Apr. 7, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals

HENRIETTA D'ARAMON, RESPONDENT ON REVIEW	}	Docket No. 10644
v.		
DAVID H. BLAIR, COMMISSIONER OF INTERNAL Revenue, petitioner on review		

Petition for review to the Court of Appeals of the District of Columbia

Now comes David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mabel Walker Willebrandt, Assistant Attorney General, and C. M. Charest, general counsel, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner on review (hereinafter referred to as the commissioner) is the duly appointed, qualified, and Acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The commissioner is informed and believes and upon such information and belief avers that Henrietta D'Aramon (hereinafter referred to as the taxpayer) is a nonresident alien and is a citizen and resident of France.

II

The commissioner determined a deficiency against the taxpayer in income tax for the year 1923 in the amount of \$630.00, and on November 6, 1925, in accordance with the provisions of section 274 of the revenue act of 1924, sent to the taxpayer by registered mail a notice of said deficiency. The taxpayer on January 5, 1926,
35 filed an appeal from the said notice of deficiency with the United States Board of Tax Appeals. In and by her said appeal the taxpayer alleged that the commissioner had erred in determining the deficiency aforesaid in that the commissioner determined that the sum of \$10,000.00 paid to the taxpayer in 1923 by the executors of the will of James Gordon Bennett, pursuant to the seventh clause of said will, constituted taxable income to the taxpayer under the revenue act of 1921.

James Gordon Bennett, a citizen of the United States and a resident of the State of New York, died on May 24, 1918, leaving a last will and testament, which was duly admitted to probate in the Surrogates' Court for the County of New York, State of New York. In and by the seventh paragraph of said will the testator gave and bequeathed to the taxpayer an annuity of \$10,000.00, to be paid to her in equal semiannual payments in each year during her life, reckoning the years from the date of the death of the testator. In said will the testator also made bequests of annuities in various amounts to other individuals, all of the said bequests of annuities being of similar tenor and in similar terms except as to the respective amounts thereof to the bequest of the annuity to the taxpayer.

In the twenty-ninth paragraph of said will the testator directed the executors of the will to cause to be incorporated a corporation, to be known as The James Gordon Bennett Memorial Home for New York Journalists Corporation, which corporation should provide and maintain a home for indigent journalists, and in said paragraph the testator gave, devised, and bequeathed the entire residue of his estate to the said corporation to be formed. In the thirtieth para-

graph of said will the testator authorized the executors of the
36 will to sell or otherwise dispose of any real or personal property of the estate for the purpose of paying legacies, annuities, debts, and expenses and authorized said executors to retain and hold any personal property to provide for the payment of said annuities.

Up to November 14, 1920, all of the annuities provided for in said will were paid out of the corpus of the estate of said James Gordon Bennett. From and after said last mentioned date all of said annuities were paid by the said executors entirely out of the income from said estate, and the annuity of \$10,000.00 paid to the taxpayer in 1923 was paid entirely out of said income. The said executors of the will of said James Gordon Bennett filed in the Surrogates' Court for the County of New York, State of New York, an intermediate account of their proceedings as such executors up to November 30, 1921, which account was thereafter approved by said court. In and by said account the said executors stated and showed, among other things, that on December 30, 1920, they, the said executors, permanently set aside certain bonds, mortgages, and other securities, constituting a large part of the estate at the time, as part

of the residuary estate and as the property of the said James Gordon Bennett Memorial Home for New York Journalists Corporation, but under the control of the executors as security for the payment of taxes, annuities, or any other charges against the estate under the will and the income therefrom to be used for the payment of the annuities as far as may be necessary.

The hearing of this appeal of the taxpayer by the Board of Tax Appeals was held on December 1, 1926, which date was after the enactment of the revenue act of 1926. On July 8, 1927, the Board of Tax Appeals issued its findings of fact and opinion in said
37 appeal, wherein and whereby the board held that the annuity paid to the taxpayer in 1923 under the said will was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921. On October 13, 1927, the Board of Tax Appeals entered a final order of redetermination in said appeal wherein and whereby the board ordered and decided that there was no deficiency against the taxpayer for the year 1923.

III

The commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the commissioner, and the commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision, and final order of redetermination and upon which he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The board erred in holding that the annuity paid to the taxpayer in 1923 was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

2. The board erred in not holding that the annuity paid to the taxpayer in 1923 was not exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

3. The board erred in holding that the amount of the annuity paid to the taxpayer in 1923 constituted the value of property acquired by gift, bequest, devise, or descent, within the meaning of section 213 (b) (3) of the revenue act of 1921.

38 4. The board erred in not holding that the amount of annuity paid to the taxpayer in 1923 did not constitute the value of property acquired by gift, bequest, devise, or descent, within the meaning of section 213 (b) (3) of the revenue act of 1921.

5. The board erred in not holding that the annuity paid to the taxpayer in 1923 was required to be paid entirely out of the income from the estate of James Gordon Bennett.

6. The board erred in not holding that the annuity paid to the taxpayer in 1923 constituted income of the estate of James Gordon Bennett during the period of administration or settlement of the said estate, which income was properly paid to the taxpayer and was distributable to the taxpayer during the year 1923, pursuant to the instrument or order governing the distribution thereof, and that such annuity constituted taxable income to the taxpayer, within the

meaning and purview of paragraphs (c) and (d) of section 219 of the revenue act of 1921.

7. The board erred in not holding that the annuity paid to the taxpayer in 1923 constituted income of the estate or trust created under the will of James Gordon Bennett, which income was, pursuant to the will or order governing the distribution thereof, distributable to the taxpayer in said year and that such annuity constituted taxable income to the taxpayer, within the meaning and purview of paragraphs (a) (4), (d), and (e) of section 219 of the revenue act of 1921.

8. The board erred in not finding as a fact that the securities of the estate of James Gordon Bennett, set aside by the executors on December 30, 1920, were so set aside upon the following, among other, terms and conditions, to wit: That the income from said securities was to be used for the payment of the annuities provided for in the will as far as might be necessary.

39 9. The findings of fact made by the board are against the evidence.

10. The findings of fact made by the board are not supported by the evidence.

11. The decision of the board is not supported in law by the findings of fact made by the board.

12. The decision of the board is not supported in law by the evidence.

13. The board erred in redetermining that there is no deficiency in income tax against the taxpayer for the year 1923.

14. The board erred in not redetermining that the deficiency against the taxpayer in income tax for the year 1923 was the amount determined by the commissioner.

IV

The commissioner, being aggrieved and prejudiced by the said decision and order of redetermination of the Board of Tax Appeals, desires to obtain a review thereof by the Court of Appeals of the District of Columbia; wherefore he petitions that a transcript of the record be prepared in accordance with the rules of the Court of Appeals of the District of Columbia and transmitted to the clerk of said court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the Court of Appeals of the District of Columbia.

(Sgd.) MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

40 DISTRICT OF COLUMBIA ss:

C. M. Charest, being duly sworn, says that he is general counsel for the Bureau of Internal Revenue and as such is duly authorized to verify the above and foregoing petition for review to the Court of Appeals of the District of Columbia; that he has read the said petition for review and is familiar with the statements therein contained

and that the facts therein stated are true, except such facts as may be stated on information and belief and those facts he believes to be true.

(Sgd.) C. M. CHAREST.

Sworn and subscribed to before me this 5th day of April, A. D. 1928.

(Sgd.) GEORGE W. KREIS,
Notary Public, District of Columbia.

My commission expires Nov. 12, 1932.

41 Filed April 13, 1928.

United States Board of Tax Appeals

HENRIETTA D'ARMON, RESPONDENT ON REVIEW	} Docket No. 10644
v.	
DAVID H. BLAIR, COMMISSIONER OF INTERNAL Revenue, petitioner on review	

Notice

To:

ROBERT W. CANDLER, Esq.,
80 William Street, New York, N. Y.

THOMAS GARRETT, Jr., Esq.,
*c/o Davis Polk Warwell Gardiner & Reed,
44 Wall Street, New York, N. Y.*

BLOUNT RALLS, Esq.,
*c/o Davis Polk Warwell Gardiner & Reed,
44 Wall Street, New York, N. Y.*

Attorneys for Henrietta D'Armon, respondent on review.

Notice is hereby given to you and each of you that the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the 7th day of April, A. D. 1928, file with the United States Board of Tax Appeals at Washington, D. C., a petition for review by the Court of Appeals of the District of Columbia of the decision rendered by said Board of Tax Appeals in said proceeding, a copy of which said petition for review as filed is herewith served upon you and each of you.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and of a copy of the petition for review mentioned in said notice is acknowledged this 9th day of April, A. D. 1928, by each of the undersigned attorneys for Henrietta D'Aramon, respondent on review in the above-entitled proceeding.

ROBERT W. CANDLER,
THOMAS GARRETT, Jr., Esq.,
BLOUNT RALLS.

Now, October 4, 1928, the foregoing petition for review and proof of service thereof certified from the record as a true copy.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

42 (Stamped:) Lodged June 26, 1928. United States Board of Tax Appeals. Filed Sept. 21, 1928, United States Board of Tax Appeals.

United States Board of Tax Appeals

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE,
petitioner on review

Doc.No.10644

v.

HENRIETTA D'ARAMON, RESPONDENT ON REVIEW

Statement of evidence

The above-entitled appeal, together with the appeals of Ronald DeReuter, Docket No. 6243, and Sybil Whitehouse, Docket No. 13220, came on for hearing before the board on December 1, 1926, pursuant to written stipulations filed with the board by counsel for the parties in all three appeals. At the hearing it was stipulated between the counsel for all parties that the three appeals be consolidated for hearing and that the evidence in any appeal should apply as well to the others.

There was received in evidence the depositions of R. W. Candler and Rowland E. Cocks, witnesses on behalf of Ronald DeReuter, taken before Albert Gerber, a notary public in and for the county of New York in the State of New York, which depositions were taken pursuant to order duly entered by the board.

The deposition of R. W. Candler was as follows:

DIRECT EXAMINATION

I am a lawyer residing at 14 Washington Square, New York City. I have a certified copy of the certificate of incorporation of the corporation known as the James Gordon Bennett Memorial Home for New York Journalists Corporation.

43 There was received in evidence as taxpayer's Exhibit 1 a copy, certified to be correct by the clerk of New York County, State of New York, and clerk of the Supreme Court, of the certificate of incorporation of the James Gordon Bennett Memorial Home for New York Journalists Corporation, which certificate of incorporation was signed and acknowledged by the incorporators of said corporation on May 10, 1919, approved by a justice of the Supreme Court of the State of New York on May 12, 1919, filed and recorded in the office of the secretary of the State of New York on May 16, 1919, and filed and recorded with the clerk of New York County, State of New York, on May 17, 1919; to which certificate of incorporation was attached an order of the State Board of Charities of the State of New York entered May 15, 1919, approving the incorporation of said the James Gordon Bennett Memorial Home for New York Journalists Corporation.

(Witness resuming)

I am secretary and treasurer and one of the directors of the James Gordon Bennett Memorial Home for New York Journalists Corporation. I have in my custody the minute book of the corporation, have transcribed or caused to be transcribed in that minute book all proceedings of the directors, and have attended the meetings of directors since its incorporation. The directors of the corporation have not taken any action or adopted any resolution for the dissolution of the corporation or the surrender of its charter. The
 44 minute book contains no record whatever of the dissolution or contemplated dissolution of the corporation, and the corporation is still actively in existence.

There was no cross-examination.

The deposition of Rowland E. Cocks was as follows:

I am personal trust officer of the Guaranty Trust Company of New York, which is one of the executors of the will of James Gordon Bennett. I am familiar with the proceedings of the Guaranty Trust Company as the executor of the James Gordon Bennett will and have followed the administration of the estate through since the appointment of this company as executor in 1919.

The Guaranty Trust Company has the custody or possession of the securities belonging to the James Gordon Bennett estate. The funds or income of the estate pass through the accounts of the Guaranty Trust Company, and the company as executor, keeps all the estate records, cash records, and security records. I am familiar with the accounts and records of the James Gordon Bennett estate. I now produce a certified copy of the will of James Gordon Bennett, dated November 11, 1916.

There was received in evidence, as taxpayer's Exhibit 2, a copy of the will of James Gordon Bennett, certified to be a correct copy under the seal of the Surrogate Court of New York County, State of New York. The material provisions of the will were as follows:

"I, James Gordon Bennett, a citizen of the United States of America, and of the State of New York, and a resident of Number 37 West Forty-seventh Street, in the borough of Manhattan, in the city of New York, hereby make, publish, and declare this to be my last will and testament as follows:

45 "First: I intend to leave at my death a will disposing of all my real and personal property situated in the Republic of France, and this will is not intended to in any way affect or dispose of any property situated in France disposed of by such other will, but it is my intention by this will to dispose of all property not disposed of by such will, which at the time of my death shall belong to me or be subject to my disposal by will.

* * * * *

"Third: I give and bequeath to my wife, Maud, an annuity of fifty thousand dollars to be paid to her in equal quarterly payments in each year during her life reckoning the years from the time of my death and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

46 "Fourth: I give and bequeath unto my sister, Jeannette Bell, the sum of fifty thousand dollars and make no further provision for her because she is already amply provided for.

"Fifth: I give and bequeath unto my nephew, Isaac Bell, an annuity of thirty thousand dollars, to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.

"Sixth: I give and bequeath to my niece, Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semiannual payments in each year during her life, reckoning the years from the time of my death.

"Seventh: I give and bequeath to my niece, Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars, to be paid to her personally, and upon her individual receipt, in equal semi-annual payments, in each year during her life, reckoning the years from the time of my death.

"Eighth: I give and bequeath to my stepson, Ronald de Reuter, an annuity of twenty thousand dollars, to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

* * * * *

"Tenth: I also give and bequeath to the said Sybel Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

(In and by the eleventh to the twenty-fifth clauses, inclusive, the testator gave and bequeathed to various individuals annuities of various amounts, each of said bequests being in the same terms, except as to names and amounts, as the bequest in the tenth paragraph.)

"All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semiannual payments reckoning from the time of my death.

"Twenty-sixth: I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

47 "Twenty-seventh: Each devise, bequest, and annuity, given by the preceding articles of this my will, shall be over and above, and free from, any and all legacy, inheritance, or transfer tax or taxes, or duty or duties, and I direct that any and all such tax or taxes, duty or duties, upon or in respect of, or upon or in respect of the transfer of such devise, bequest, and annuity, shall be paid by my executors out of my estate as part of the expense of administration thereof, so that each devisee, legatee, and annuitant, shall receive the full amount of each devise, bequest, or annuity hereby given to him or her, free from any such tax or duty."

48 "Twenty-eighth: Each legacy or annuity hereby given to a woman now or hereafter married, shall be for her own separate use, and not subject to the debts or control of her husband. Each such legacy and annuity shall be payable to the legatee or annuitant in person only, and on her or his personal receipt, and shall be inalienable and not capable of anticipation, pledge, or transfer, in whole or in part, by the legatee or annuitant. All annuities hereby given shall

commence at the time of my death and be payable in equal parts half-yearly, except as hereinabove specifically mentioned.

"Twenty-ninth: It is my long-cherished intention and purpose, and it is my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the New York Herald, and therefore to that end and to effectuate my said intention and purpose, I direct the executors of this my will hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists" in memory of my father and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the Borough of Manhattan in the city of New York, and who shall by reason of old age, accident, or bodily infirmity, and through lack of means be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval and acceptance of persons to receive the benefits of such home or such aid, give the preference to any person who shall be or shall have been employed by or associated with the New York Herald Company or the New York Herald
49 Company Societe Anonyme Francaise upon or in connection with either the New York or the European edition of the New York Herald newspaper or the Evening Telegram newspaper. The said Memorial Home Corporation shall establish and maintain a suitable building or suitable buildings and grounds and appurtenances to provide a home or homes for the persons so to be benefited or aided and may also aid any such person or persons by pecuniary or other contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise, and bequeath all the rest, residue, and remainder of all the estate and property, real and personal, and of every kind and nature and wheresoever situated which shall belong to me or be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such Home Corporation shall be so duly incorporated and entitled to receive such residuary estate and property, I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive

me. It is my desire and will that such Memorial Home Corporation shall own and as soon as the due administration of my estate shall permit, receive, and that it shall hold as long as practicable all capital stock of the New York Herald Company and the New York Herald Company Societe Anonyme Francaise which shall belong to me at my death and form part of my residuary estate and property, and that by virtue of its ownership of such stock it shall from time to time elect such persons as directors of said the New York Herald Company and said the New York Herald Company Societe Anonyme Francaise as shall continue to manage each of said companies and conduct the business and publication and management of the New York Herald newspaper in both its New York and European editions and the Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable, as the same shall be conducted at the time of my death. It is also my wish and hope and I request that the directors of said New York Herald corporations shall so manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations or either of them as shall provide reserve or surplus funds sufficient in their judgment to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by

50 said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will hereafter named and each persons who may at any time be an executor of my will, shall be and act as a director of such Memorial Home Corporation and a director of each of said corporations the New York Herald Company and the New York Herald Company Societe Anonyme Francaise. It is also my will and I direct that each executor of this my will who shall act as a director of such Memorial Home Corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in addition to any commissions or compensations which he may receive or be entitled to for his services as an executor of this will.

"Thirtieth: I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executor of this my will and that each such executor may be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or

personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any device, bequest, or annuity given or made by this my will or any codicil thereto. I

51 authorize and empower said executors or executor or retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of the New York Herald Company or the New York Herald Company Societe Anonyme Francaise unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said Memorial Home Corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will.

* * * * *

“(Signed and witnessed on November 11, 1916.)”

(Witness resuming)

I am familiar with the terms of the will and with the eighth clause of the will by which the testator gave and bequeathed to Ronald DeReuter an annuity of \$20,000 to be paid in semiannual payments during each year of his life. I know that the sum of \$20,000 has been paid to Ronald DeReuter each year in accordance with that clause of the will. I know that the executors of the James Gordon Bennett estate have not set apart or constituted a separate trust or trust fund to produce or provide the sum of \$20,000 a year to pay the annuity to Ronald DeReuter. The will of James Gordon Bennett did not appoint any trustees.

CROSS-EXAMINATION

All of the securities which I testified were in the possession of the executor are held by the Guaranty Trust Company to pay not only this annuity but other annuities in the will. I am sure that the annuities for the year 1923 were paid out of the income from

52 the securities in the possession of the executor.

REDIRECT EXAMINATION

The executors are holding the securities and assets constituting the estate of James Gordon Bennett.

There was received in evidence, as taxpayer's Exhibit 3, a copy, duly certified to be correct, of a decree or order entered on August 10, 1922, by the surrogate of New York County, approving and settling the intermediate account of the executors of the will of James Gordon Bennett down to and including the 30th day of November, 1921.

(Witness resuming)

The securities, which I testified are at present held by the executors, are held as set apart on their books for the residuary devisee and legatee, subject to the payment of taxes, annuities, and other charges, in the same manner as they were held in November, 1921.

(This concluded the deposition of Rowland E. Cocks.)

By agreement of counsel for all parties at the hearing, there was received in evidence, as an exhibit, a copy, duly certified to be correct, of the intermediate account of the executors of the will of James Gordon Bennett to November 30, 1921. The material portions of this account were as follows:

* * * * *

53

SUMMARY

As to the principal of said estate

The said executors charge themselves as follows:

With amount of—

Cash received from sales of real property as shown by Schedule A, Part II-----	\$753, 697. 18
Cash belonging to testator at the time of his death as shown by Schedule A, Part III-----	7, 071. 38
Cash received from sale of personal property and as shown by Schedule A, Part IV-----	1, 498, 972. 85
	2, 259, 741. 41

And they ask to be credited as follows:

With amount of—

Expenses on sale of real property as shown by Schedule B, Part I-----	\$1, 523, 051. 93
Expenses of administration as shown by Schedule B, Part II-----	202, 757. 37
Payments to creditors as shown by Schedule B, Part III-----	10, 692. 49
Legacies paid as shown by Schedule C, Part I-----	53, 646. 02
Payments from principal on account of annuities as shown by Schedule C, Part II-----	278, 500. 00
Proceeds of mortgages reinvested as shown by Schedule C, Part III-----	34, 741. 24
	2, 103, 389. 05

Leaving a cash balance of principal of----- 156, 352. 36

with which the said executors charge themselves as of November 30, 1921, the date to which this account is brought down.

As to the income of the said estate

The said executors charge themselves as follows:

With amount of—

Income received as shown by—	
Schedule A, Part II-----	\$105, 704. 10
Schedule A, Part V-----	225, 150. 65
	330, 854. 75

54 And they ask to be credited as follows:

With amount of—

Expenses as shown by Schedule B, Part IV-----	\$42,832.68
Payments from income on account of annuities as shown by Schedule C, Part II-----	209,175.31
Payments on account of The James Gordon Bennett Memorial Home as shown by Schedule C, Part IV-----	21,120.00
	<u>273,127.99</u>

Leaving a cash balance of income of----- 57,726.76

with which the said executors charge themselves as of November 30, 1921.

* * * * *

SCHEDULE A, PART II

A statement of all real property mentioned in Schedule A, Part I, sold by said executors, the details of such sales, the moneys received therefor, including principal and interest received on purchase money mortgages, and moneys received on instalment contracts.

* * * * *

SUMMARY

	Purchase price	Cash paid	Original amount of bond and mortgage	Original amount of installment contracts	Balance due	Interest received
Fort Washington property-----	\$1,722,800.00	\$624,810.00	\$1,159,750.00	-----	\$1,097,990.00	\$105,597.85
Yonkers property-----	259,355.00	118,037.18	21,537.00	\$69,078.50	141,051.57	74.20
Miscellaneous-----	11,300.00	10,850.00	600.00	-----	450.00	32.05
Total-----	1,993,455.00	753,697.18	1,181,887.00	69,078.50	1,239,491.57	105,704.10

55

SCHEDULE A, PART V

A statement of all moneys received by said executors on account of income derived from said estate, including all rents from said real property and all interest, dividends and other income received, except as set forth in Schedule A, Part II.

1918. Various items, aggregating-----	\$35.00
1919. Various items, aggregating-----	956.86
1920. Various items, aggregating-----	81,126.34
1921. Various items, aggregating-----	143,032.45
Total-----	<u>225,150.65</u>

SCHEDULE B, PART IV

A statement of all moneys paid from income of said estate for necessary expenses properly chargeable thereto.

1919. Various items, aggregating-----	\$278.12
1920. Various items, aggregating-----	2,364.56
1921. Various items, aggregating-----	40,190.00
Total-----	<u>42,832.68</u>

SCHEDULE C, PART II

56 A statement of all moneys paid on account of the annuities given and bequeathed in and by said will, and whether paid from principal or income of said estate and the amounts withheld therefrom to meet any income tax thereon.

	Name, address, and period Henrietta d'Aramon, No. 1 Boulevard la Tour Maubourg, Paris, France	Principal	Income	Tax withheld principal	Tax withheld income
1920					
Apr. 23	Payment to May 14, 1919.....	\$9,090.00		\$910.00	
May 21	Payment to May 14, 1920.....	8,600.00		1,400.00	
Nov. 17	Payment to November 14, 1920.....		\$4,110.00		\$890.00
1921					
May 16	Payment to May 14, 1921.....		4,760.00		240.00
Nov. 14	Payment to November 14, 1921.....		4,330.00		670.00

SCHEDULE C, PART III

A statement of the assets of said estate which have been permanently set aside to the James Gordon Bennett Memorial Home for New York Journalists Corporation, the residuary devisee and legatee under said will, but subject to taxes, annuities, and other charges.

On December 30, 1920, the said executors permanently set aside as part of the residuary estate and as the property of the James Gordon Bennett Memorial Home for New York Journalists Corporation, but under the control of the executors as security for the payment of taxes, annuities, or any other charges against the estate under the will and the income therefrom to be used for the payment of the annuities as far as may be necessary, the following securities, viz:

* * * * *

SUMMARY

of assets so set aside as aforesaid

Promissory notes of Frank A. Munsey Co.....	\$2,000,000.00
Bonds and mortgages on Fort Washington property, balance of principal due thereon.....	1,097,990.00
Bond and mortgage of Norman Countryman, balance of principal due thereon.....	450.00
\$34,900 U. S. Victory loan bonds, amount invested therein.....	34,741.24
Balance of cash uninvested.....	78.76
Total.....	3,133,260.00

57

SCHEDULE D

A statement of all real property mentioned in Schedule A, Part I, remaining unsold and of all personal property mentioned in Schedule A, Part III, remaining unsold or undisposed of, and of all other moneys, securities, and other personal property in the hands of the said executors on the 30th day of November, 1921, including the said assets so permanently set aside for the James Gordon Bennett Memorial Home for New York Journalists Corporation as aforesaid,

with the appraised value of, the amount secured by, or invested in said personal property; and which said real and personal property constituted the balance of the estate of the said testator held by the said executors under said will on said date.

* * * * *

RECAPITULATION

Real property, Borough of Bronx, section 12, block 3376, lot 98

YONKERS LOTS UNSOLD

Lots 21 and 22, Block 15, Map A
 " 1-7 " 17, " B
 " 1-11 " 1, " B

YONKERS LOTS SOLD BUT SALES NOT CLOSED

Balance of purchase price----- \$56, 828. 25

PERSONAL PROPERTY

Personal and household effect appraised value----- 8, 578. 95

SECURITIES

Appraised values thereof, amounts invested therein, or due thereon----- 3, 855, 975. 66

MONEYS

Balance of principal----- 156, 352. 36
 Balance of income----- 57, 726. 76

Total----- 4, 135, 461. 98

Retained by Title Guarantee & Trust Co.----- 3, 000. 00

* * * * *

58 There was offered in evidence on behalf of taxpayers a letter or notice sent by the Commissioner of Internal Revenue to the estate of James Gordon Bennett, relating to the liability of the estate for the Federal estate tax. Objected to as irrelevant, incompetent, and immaterial to any issue in these appeals. Objection sustained, and exception taken and noted.

The above and foregoing statement of evidence is approved, settled and allowed this 21st day of September, A. D., 1928.

(Sgd.) JOHN B. MILLIKEN,
Member United States Board of Tax Appeals.

Now, October 4, 1928, the foregoing statement of evidence certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

59 (Stamped): Filed June 26, 1928. United States Board of Tax Appeals.

United States Board of Tax Appeals

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE, petitioner on review

v.

HENRIETTA D'ARAMON, RESPONDENT ON REVIEW

Doc. No. 10644

Præcipe

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the clerk of the Court of Appeals of the District of Columbia copies, duly certified as correct, of the following documents and records in the above-entitled cause in connection with the petition for review by the said Court of Appeals of the District of Columbia heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the board.
2. Pleadings before the board.
 - (a) Petition, including annexed copy of deficiency letter.
 - (b) Answer.
3. Findings of fact, opinion, and decision of the board.
4. Petition for review, together with proof of service of notice of filing petition for review and of service of copy of petition for review.
5. The statement of evidence as settled and allowed.
6. Orders enlarging the time for the preparation of the evidence and for the transmission and delivery of the record.
7. This præcipe.

(Sgd.) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing præcipe certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals

HENRIETTA D'ARAMON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 10644

Order enlarging time

On motion of counsel for the respondent, it is

Ordered, that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above-entitled proceeding in the Circuit Court of Appeals of the District of Columbia be and is hereby extended to July 8, 1928.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., June 6, 1928.

A true copy. Teste.

[SEAL.]

B. D. GAMBLE, *Clerk.*

61 United States Board of Tax Appeals

Henrietta D'Aramon, petitioner, v. Commissioner of Internal Revenue, respondent. Docket No. 10644

Order enlarging time

On motion of the respondent and for good cause shown, it is Ordered, that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above-entitled proceeding in the Court of Appeals of the District of Columbia be and is hereby extended from July 8, 1928, to July 28, 1928.

(Signed) B. H. LITTLETON,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., June 29, 1928.

A true copy. Teste.

[SEAL.]

B. D. GAMBLE, *Clk.*

62 United States Board of Tax Appeals

Henrietta D'Aramon, petitioner v. Commissioner of Internal Revenue, respondent. Docket No. 10644

Order enlarging time

For good cause shown, it is Ordered, that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above-entitled proceeding in the Court of Appeals of the District of Columbia be and is hereby extended to August 8, 1928.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., July 7, 1926.

A true copy. Teste.

[SEAL.]

B. D. GAMBLE, *Clk.*

63 United States Board of Tax Appeals

Henrietta D'Aramon, petitioner, v. Commissioner of Internal Revenue, respondent. Docket No. 10644

Order enlarging time

For good cause shown, it is Ordered, that the time for preparation of evidence and transmission and delivery or record papers *sur* petition for review of the above-entitled proceeding in the Court of Appeals of the District of Columbia be and is hereby extended from August 8, 1928, to August 22, 1928.

(Signed) JOHN M. STERNHAGEN,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., July 24, 1928.

A true copy. Teste.

[SEAL.]

B. D. GAMBLE, *Clerk.*

United States Board of Tax Appeals

Henrietta D'Aramon, petitioner, *v.* Commissioner of Internal Revenue, respondent. Docket No. 10644

Order enlarging time

For good cause shown, it is

Ordered, that the time for filing certified copies of record papers *sur* petition for review of the above-entitled proceeding in the Court of Appeals for the District of Columbia be and it is hereby extended to September 1, 1928.

(Signed) JOHN M. STERNHAGEN,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., August 13, 1928.

A true copy. Teste.

[SEAL.]

B. D. GAMBLE, *Clerk.*

United States Board of Tax Appeals

Henrietta D'Aramon, petitioner, *v.* Commissioner of Internal Revenue, respondent. Docket No. 10644

Order enlarging time

On motion of the respondent and for good cause shown, it is

Ordered, that the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above proceeding in the Court of Appeals for the District of Columbia, be and it is hereby extended from August 22, 1928, to September 22, 1928.

(Signed) John M. STERNHAGEN,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., August 22, 1928.

A true copy. Teste.

[SEAL.]

B. D. GAMBLE,
Clk.

For good cause shown, it is

Ordered, that the time for filing certified copies of record papers *sur* petition for review of the above-entitled proceeding in the Court of Appeals for the District of Columbia be and it is hereby extended to October 8, 1928.

(Signed) B. H. LITTLETON,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., September 21, 1928.

A true copy. Teste.

[SEAL.]

B. D. GAMBLE, *Clk.*

66

United States Board of Tax Appeals

Henrietta D'Aramon, petitioner, *v.* Commissioner of Internal Revenue, respondent. Docket No. 10644

Order enlarging time

(Indorsed on cover:) Board of Tax Appeals. No. 4847. David H. Blair, Commissioner of Internal Revenue, appellant, *vs.* Henrietta D'Aramon. Court of Appeals, District of Columbia. Filed Oct. 8, 1928. Henry W. Hodges, clerk.

○

TRANSCRIPT OF RECORD

COURT OF APPEALS, DISTRICT OF COLUMBIA

OCTOBER TERM, 1928

David Burnett

No. 4848

Robert H. Lucas

~~DAVID H. BLAIR~~, COMMISSIONER OF INTERNAL
REVENUE, APPELLANT

vs.

RONALD DE REUTER

APPEAL FROM THE BOARD OF TAX APPEALS

FILED OCTOBER 8, 1928

COURT OF APPEALS, DISTRICT OF COLUMBIA

OCTOBER TERM, 1928

No. 4848

DAVID H. BLAIR, COMMISSIONER OF INTERNAL
REVENUE, PETITIONER ON REVIEW

vs.

RONALD DE REUTER, RESPONDENT ON REVIEW

ON PETITION TO REVIEW THE DECISION OF THE UNITED STATES
BOARD OF TAX APPEALS.

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1 RONALD DE REUTER, c/o COUDERT BROTHERS,
 2 Rector St., New York, N. Y., petitioner. } Docket 6243
 v.
 COMMISSIONER OF INTERNAL REVENUE, RESPONDENT. }

For the taxpayer: F. R. Coudert, Esq., T. W. Kelly, Esq., Blount Ralls, Esq., R. W. Candler, Esq., S. D. Bowers, Esq.

For the Commissioner: T. P. Dudley, Esq., A. H. Murray, Esq.

Docket entries

1925

- Aug. 14. Petition received and filed.
- " 17. Copy of petition served on solicitor.
- " 17. Notification of receipt mailed taxpayer.
- " 24. Copy of corrected petition served on solicitor. Taxpayer notified.
- Sept. 8. Answer filed by solicitor.
- " 14. Copy of answer served on taxpayer. Assigned to 2-8-26.

1926

- Jan. 7. Application for order to take depositions filed by taxpayer.
- " 12. Stipulation to take depositions filed.
- " 23. Depositions filed. Copy served. (R. E. Cocks, R. W. Candler.)
- " 25. Copy of depositions of Candler and Cocks served on solicitor.
- Feb. 2. Stipulation to adjourn hearing filed.
- " 3. Ordered—Appeal transferred to reserve "B;" signed and filed. Both sides notified.
- July 17. Motion that appeal be placed on day calendar filed by solicitor.
- " 21. Ordered—Appeal transferred to general calendar; signed and filed. Both sides notified.
- Sept. 17. Hearing date set for 12-1-26.
- Nov. 13. Stipulation to combine for hearing 6243, 10644, and 13220 filed.
- " 15. Stipulation to advance hearings of 10644 and 13220 to be heard with 6243 filed.
- " 23. Notice of appearance of Coudert & Kelly filed.
- Dec. 1. Hearing had before Mr. Milliken on merits. Briefs due 1-15-27.
- " 15. Copy of account of proceedings of the executors u/w of James Gordon Bennett filed by taxpayer.
- " 30. Transcript of hearing filed. 12-1-26.

1927

- Jan. 5. Motion for extension to 2-15-27 to file brief filed by taxpayer.
- " 11. Ordered—That date for filing of briefs be extended to 2-15-27 signed and filed. Both sides notified.
- " 15. Motion for extension to 2-15-27 to file brief filed by G. C.
- " 20. Granted. Both sides notified.
- " 22. Brief filed by taxpayer.
- Feb. 15. Motion for extension to 3-17-27 to file brief filed by G. C.
- " 17. Granted. Both sides notified.

- 2 Mar. 16. Motion for extension to 4-16-27 to file brief filed by G. C.
- " 18. Granted. Both sides notified.
- Apr. 14. Motion for extension to 6-1-17 to file brief filed by G. C.
- " 15. Granted. Both sides notified.
- June 1. Brief filed by G. C.
- July 8. Findings of fact and opinion rendered. Judgment will be entered on 15 days' notice. No. 50. Both sides notified.
- Aug. 22. Notice of settlement filed by G. C.
- " 24. Notice allowing taxpayer until 10-3-27 to file alternative settlement for hearing 10-20-27. Failure to do so hearing set 10-12-27.
- Oct. 12. Hearing had before Mr. Littleton on settlement No. 50. Assigned to Mr. Milliken.
- " 13. Order and decision redetermining deficiency signed and filed. Both sides notified.
- 1928
- Apr. 7. Petition for review by Court of Appeals of D. C., with assignments of error filed by G. C.
- " 13. Proof of service filed by G. C.
- " 13. Affidavit of service of petition for review on Thos. W. Kelly filed by Frederick K. Slanker.
- June 1. Motion for extension to 7-8-28 for preparation of evidence and transmission and delivery of documents filed by G. C.
- " 6. Order enlarging time for preparation of evidence and transmission and delivery of record papers sur petition for review to 7-8-28 entered.
- " 26. Praecipe of record filed by G. C.
- " 26. Statement of evidence lodged by G. C.
- " 26. Motion for extension to 7-28-28 for preparation and transmission of record filed by G. C.
- " 29. Order enlarging time to 7-28-28 for preparation of evidence and transmission and delivery of record papers sur petition entered.
- " 29. Notice of hearing on statement of evidence on 7-11-28 instead of 7-10-28.
- July 2. Proof of service of praecipe and statement of evidence for hearing on 7-10-28 filed by G. C.
- " 7. Order enlarging time to 8-8-28 entered.
- " 11. Hearing had before Mr. Green; continued to 8-8-28.
- " 11. Order placing on calendar for 8-8-28 for hearing on approval of statement of evidence entered.
- " 24. Order enlarging time to 8-22-28 for preparation of evidence and transmission of record sur petition entered.
- Aug. 8. Hearing had before Mr. Sternhagen; 10 days additional time granted to submit record.
- " 8. Order of continuance to 8-22-28 entered.
- " 13. Order enlarging time to 9-1-28 for filing certified copies of record papers sur petition for review entered.
- " 22. Motion for extension to 9-22-28 for the preparation of evidence, transmission and delivery of the record papers filed by G. C.

Aug. 22. Order enlarging time to 9-22-28 entered.

Sept. 21. Statement of evidence approved and ordered filed.

" 21. Order enlarging time to 10-8-28 for filing certified copies of record papers sur petition entered.

Now, October 4, 1928, the foregoing docket entries certified from the record as a true copy.

[SEAL]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

4

UNITED STATES BOARD OF TAX APPEALS

Appeal of Ronald De Reuter % Coudert Brothers, 2 Rector Street,
New York City, N. Y. Docket No. 6243

Petition

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter bearing bureau symbols, IT:PA:2-60 D:LVH:201, dated June 19, 1925, and as the basis of his appeal sets forth the following:

(1) The taxpayer is a nonresident alien, being a citizen of France and resides at 37 Avenue d'Iena, Paris, France; he may be addressed in the United States % Coudert Brothers, No. 2 Rector Street, New York City, N. Y.

(II) The deficiency letter, a copy of which is attached, was mailed to the taxpayer on June 19, 1925.

(III) The taxes in controversy are income taxes for the calendar year 1923 and are less than \$10,000, to-wit, fourteen hundred seventy (\$1,470.00) dollars.

(IV) The determination of tax contained in the said deficiency letter is based upon the following errors:

(1) That the sum of \$20,000, paid to Ronald de Reuter in 1923 by the executors of the will of James Gordon Bennett, deceased, pursuant to the eighth clause of the will of said decedent, is income taxable under the provisions of the revenue act of 1921 or any other law.

(V) The facts upon which the taxpayer relies as the basis of his appeal are as follows:

(a) James Gordon Bennett, a citizen of the United States of America died on or about May 14, 1918, leaving a will by which he provided as follows:

"Eighth: I give and bequeath to my stepson Ronald de Reuter an annuity of twenty thousand dollars, to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death."

By the 29th clause of his will the said decedent directed the incorporation by his executors of a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists," the purpose of which is to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years on newspapers or journals published in the Borough of Manhattan, New York City, and who are unable to care for themselves, and he gave all the residue of his estate to said corporation.

Said decedent further provided by the thirtieth clause of his will as follows:

"For the purpose of paying any legacy or legacies or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will, or for the administration of my estate, or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto.

"I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

(b) The corporation above referred to, viz, "The James Gordon Bennett Memorial Home for New York Journalists Corporation," is a charitable corporation incorporated under the laws of the State of New York with the approval of the State Board of Charities in May, 1919, and is now existing under the laws of the State of New York.

(c) Rodman Wanamaker and the Guaranty Trust Company of New York have duly qualified and are now acting as executors under said will.

(d) In the year 1924 the said executors filed a nonresident income tax return on Form 1040B for Ronald de Reuter for the year 1923 in which they set forth that they had paid to him in the last year (1923) the sum of \$20,000 on account of his annuity and stated that they were advised by counsel that said annuity was a legacy and not income taxable to Ronald de Reuter.

(e) No trust has been constituted by the executors of the said will of James Gordon Bennett to provide for the payment of the bequest under the eighth clause of the said will.

(VI) The taxpayer in support of his appeal relies upon the following propositions of law:

(a) That the sum of \$20,000, paid by said executors to Ronald de Reuter in 1923, is not taxable income, because it is property acquired by bequest within the terms of section 213 (b) 3 of the revenue act of 1921 and is, therefore, not included in gross income for the purposes of that act.

(b) The gift, bequest, or legacy set forth in clause 8 of the will is not a gift of income, nor is the sum paid by the executors to Ronald de Reuter income from any source or accruing upon any securities or property.

(c) The gift, bequest, or legacy under the eighth clause of the will of James Gordon Bennett is in the nature of a gross sum payable in instalments.

(d) The said bequest does not constitute a trust the income of which is distributable periodically, and it does not fall within the terms of article 345 of Regulation 62 nor within the terms of the revenue act of 1921.

7 (e) The gift, bequest, legacy, or annuity contained in the eighth paragraph of said will as aforesaid is when and as received by said taxpayer, principal and not income, and it is not subject to tax under the sixteenth amendment of the Constitution of the United States; and any tax or attempt to tax such gift, bequest, legacy, or annuity is and would be unconstitutional and void and in violation of sections eighth and ninth of Article I of said Constitution.

Wherefore the taxpayer respectfully prays that this board may hear and determine his appeal.

LORENZO SEMPLÉ,
Counsel for taxpayer.

Post office address: No. 2 Rector Street, New York City.

GREAT BRITAIN AND IRELAND, LONDON, ENGLAND,

Consulate General of the United States of America, ss:

Ronald De Reuter being duly sworn, says that he is the petitioner above named; that he said read the said petition or had the same read to him and is familiar with the statements therein contained and that the facts therein stated are true except such facts as are stated to be on information and belief and these facts he believes to be true.

RONALD DE REUTER.

Sworn to before me this 5th day of August, 1925.

J. P. DOUGHTEN,

Consul United States of America at London, England.

No fee prescribed; No. 10528.

8

TREASURY DEPARTMENT,
Washington, June 19, 1925.

Address reply to
Commissioner of Internal Revenue
and refer to IT:PA:2-60D
LVH:201

Mr. RONALD de REUTER,

% Coudert Brothers, 2 Rector Street, New York, New York.

SIR: The determination of your income tax liability for the taxable year 1923 disclosed a deficiency in tax amounting to \$1,470.00.

In accordance with the provisions of section 274 of the revenue act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file and appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:2 60D-LVH:201. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By J. G. BRIGHT,
Deputy Commissioner.

Inclosures: Statements, agreement Form A.

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Statement

IT:PA:2-60D
LVH:201

JUNE 19, 1925.

In re Mr. Ronald de Reuter c/o Coudert Brothers, 2 Rector Street,
New York, New York

Deficiency in tax, 1923 ----- \$1,470.00

This deficiency results from the inclusion of an annuity amounting to \$20,000.00 received by you under the terms of the will of James Gordon Bennett that had not been treated as income by you in your return as filed.

You are advised that careful consideration has been given to the protests filed in your behalf with the collector's Board of Tax Appeals and the Commissioner of Internal Revenue against the additional tax in question by this office finds no evidence that would warrant a change in its decision that the amount is taxable under article 345, Regulations 62. The proposed action of which you were advised in office letter dated March 12, 1925, is therefore sustained.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the collector's lists.

Payment should not be made until a bill is received from the collector of internal revenue for your district, and remittance should then be made to him.

Now, October 4, 1928, the foregoing petition certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Appeal of Ronald De Reuter, c/o Coudert Brothers, 2 Rector St.,
New York, N. Y. Docket No. 6243

Answer

The commissioner of Internal Revenue, by his attorney A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above mentioned taxpayer, admits, denies and alleges as follows:

(1) Admits the allegations of paragraphs (I), (II), and (III) of the petition.

(2) Admits that the sum of \$20,000 paid to the taxpayer in 1923 by the executors of the will of James Gordon Bennett, deceased, pursuant to the 8th paragraph of the will of said decedent, has been held by the commissioner to be income taxable under the provisions of the revenue act of 1921.

(3) Denies that any error has been committed in the determination of the deficiency set forth in the deficiency letter.

(4) Admits the allegations contained in subdivisions (a), (c) and (d) of paragraph (V) of the petition.

(5) Denies, generally and specifically, each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Propositions of law

1. That the sum of \$20,000 paid by the executors to the taxpayer in 1923, which was paid out of the income of the estate left by the decedent and not out of the corpus thereof, as the commissioner verily believes to be the case, is taxable income under section 213 (a) of the revenue act of 1921.

2. That the bequest set forth in the 8th paragraph of the will of the decedent is payable either out of income or out of corpus under the directions contained in the 30th paragraph of the will, but that income is first charged with the payment of such bequest.

Therefore, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,

Solicitor of Internal Revenue,

Attorney for the Commissioner of Internal Revenue.

Of counsel:

ELLIS W. MANNING,

Special Attorney,

Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing answer certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

Ronald De Reuter, petitioner, *v.* Commissioner of Internal Revenue,
respondent

Henrietta D'Aramon, petitioner, *v.* Commissioner of Internal Revenue,
respondent

Sybil Whitehouse, petitioner, *v.* Commissioner of Internal Revenue,
respondent

Docket Nos. 6243, 10644, 13220. Promulgated July 8, 1927

Where the testator bequeathed to petitioner an annuity and where his will contained no direction to pay the annuity out of the income of his estate; *held*, that the moneys received by petitioner as payments of his annuity is exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

Frederick R. Coudert, Esq., Thomas Kelly, Esq., Blount Ralls, Esq., Robert W. Candler, Esq., and S. D. Bowers, Esq., for the petitioners.

Thomas P. Dudley, jr., Esq., for the respondent.

The above proceedings were, by agreement, consolidated and heard together and involve deficiencies in income tax in the case of Ronald De Reuter, for the calendar year 1923, in the sum of \$1,470; in the case of Henrietta D'Aramon, for the calendar year 1923, in the sum of \$630; and in the case of Sybil Whitehouse, for the calendar year 1921, in the sum of \$920.79. These deficiencies arise by reason of the fact that the commissioner included in gross income for each petitioner a certain annuity bequeathed to petitioner by the will of James Gordon Bennett. Petitioner Sybil Whitehouse further contends that the commissioner erred in not permitting the deduction of certain death taxes paid by the estate of James Gordon Bennett to the States of New York, New Jersey, and Rhode Island. In a brief filed in behalf of said petitioner this last contention has been withdrawn.

Findings of fact

The petitioner, Ronald De Reuter, is a nonresident alien, a citizen of France, and resides at 37 Avenue d'Iona, Paris, France. Petitioner Henrietta D'Aramon is a nonresident alien, a citizen of France, resident at No. 1 Boulevard La Tour, Mauborg, Paris, France. Petitioner Sybil Whitehouse is a resident of the city of Newport, Rhode Island, and her principal place of business is at Stone Villa, Newport, Rhode Island.

James Gordon Bennett, a citizen of the United States and a resident of the State of New York, died in the Republic of France, May 24, 1918, leaving a last will and testament, the material portions of which are:

"Third: I give and bequeath to my wife Maud an annuity of fifty thousand dollars to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death, and I hereby declare that this provision is made to her in lieu

of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

"Fourth: I give and bequeath unto my sister Jeannette Bell the sum of fifty thousand dollars and make no further provision for her because she is already amply provided for.

"Fifth: I give and bequeath unto my nephew Isaac Bell an annuity of thirty thousand dollars, to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

"Sixth: I give and bequeath to my niece, Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semiannual payments in each year during her life, reckoning the years from the time of my death.

"Seventh: I give and bequeath to my niece Henrietta, wife of Count Paul D'Aramon, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semiannual payments in each year during her life, reckoning the years from the time of my death.

"Eighth: I give and bequeath to my stepson Ronald De
14 Reuter an annuity of twenty thousand dollars to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

"Ninth: I give and devise absolutely and in fee simple, to Sybil Douglas, wife of William Whitehouse, my cottage or stone villa, consisting of a parcel of land and buildings thereon, situated at Newport, in the State of Rhode Island, known as "Stone Villa" to have and to hold the same to her, her heirs, and assigns forever; and if during my life I shall sell the said cottage, then and in such case I give and bequeath unto the said Sybil Douglas, wife of William Whitehouse a sum equal to the amount for which I shall have sold the said cottage.

"Tenth: I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

By the eleventh to twenty-fifth clauses, inclusive, the testator bequeaths annuities ranging from \$500 to \$5,000 to various persons. Then follows:

"All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semiannual payments reckoning from the time of my death.

"Twenty-sixth: I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

"Twenty-ninth: It is my long-cherished intention and purpose and it is my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the "New York Herald," and therefore to that end and to effectuate my said intention and purpose, I direct the executors of this my will hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after

my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists" in memory of my father and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the Borough of Manhattan in the city of New York, and who shall by reason of
15 old age, accident or bodily infirmity, and through lack of means be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval and acceptance of persons to receive the benefits of such home or such aid, give the preference to any person who shall be or shall have been employed by or associated with the New York Herald Company or The New York Herald Company Société Anonyme Française upon or in connection with either the New York or the European Edition of The New York Herald newspaper or the Evening Telegram newspaper. The said Memorial Home Corporation shall establish and maintain a suitable building or suitable buildings and grounds and appurtenances to provide a home or homes for the persons so to be benefited or aided and may also aid any such person or persons by pecuniary or other contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise and bequeath all the rest, residue and remainder of all the estate and property real and personal and of every kind and nature and wheresoever situated which shall belong to me or be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such Home Corporation shall be so duly incorporated and entitled to receive such residuary estate and property, I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such Memorial Home Corporation shall own and as soon as the due administration of my estate shall permit, receive and that it shall hold as long as practicable all capital stock of The New York Herald Company and the New York Herald Company Société Anonyme Française which shall belong to me at my death and form part of my residuary estate and property, and that by virtue of its ownership of such stock, it shall from time to time elect such persons as directors of said The New York Herald Com-

pany and said The New York Herald Company Société Anonyme Française as shall continue to manage each of said companies and conduct the business and publication and management of The New York Herald newspaper in both its New York and European editions and The Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable, as the same shall be conducted at the time of my death.

16 It is also my wish and hope and I request that the directors of said New York Herald Corporations shall so manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations or either of them as shall provide reserve or surplus funds sufficient in their judgment to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the cost of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will hereafter named and each persons who may at any time be an executor of my will, shall be and act as a director of such Memorial Home Corporation and a director of each of said corporations The New York Herald Company and The New York Herald Company Société Anonyme Française. It is also my will and I direct that each executor of this my will who shall act as a director of such Memorial Home Corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in addition to any commissions or compensations which he may receive or be entitled to for his services as an executor of this will.

“Thirtieth: I hereby nominate and appoint my friends Eugene Higgins, Rodman Wanamaker, and James Stillman to be the executors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executor of this my will and that each such executor may be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed,

assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto. I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and
 17 to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of The New York Herald Company or The New York Herald Company Société Anonyme Francaise unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said Memorial Home Corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will."

All the annuities involved in these proceedings, to wit, those paid the petitioners, Ronald De Reuter and Henrietta D'Aramon, in the year 1923, and to Sybil Whitehouse in the year 1921, were paid by executors of the will of James Gordon Bennett out of the income of the estate. In November, 1921, the executors of the will of James Gordon Bennett filed in the Surrogate's Court for the County of New York, State of New York, an intermediate account of settlement which was thereafter approved by said court. That account showed that all of the annuities herein involved were, prior to November 14, 1920, paid out of the corpus of the estate and all such annuities were, on and after November 14, 1920, paid out of the income of the estate. The total amount of the annuities payable in 1920 was \$144,000. The account of settlement shows that the executors, on December 30, 1920, permanently set aside to the James Gordon Bennett Memorial Home for New York Journalists Corporation, which was organized under the laws of New York in May, 1919, the residuary devisee and legatee under said will, subject to taxes, annuities, and other charges, the following assets:

18	Promissory notes of Frank A. Munsey Co.....	\$2,000,000.00
	Bonds and mortgages on Fort Washington property, balance of principal due thereon.....	1,097,990.00
	Bond and mortgage of Norman Countryman, balance of principal due thereon.....	450.00
	\$34,900 U. S. Victory Loan bonds, amount invested therein.....	34,741.24
	Balance of cash uninvested.....	78.76
	Total.....	3,133,260.00

Opinion

MILLIKEN. In view of the conclusion which we have reached, we find it necessary to discuss but one question and that is, whether the annuities received by the petitioners under the will of James Gordon Bennett constitute income which is taxable by reason of the provisions of the revenue act of 1921. The applicable provisions of that act are:

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case

of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof. or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (c) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

“(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

“(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income) * * *

“SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

19 “(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

“(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

“(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

“(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust then there shall be

included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary."

The question presented is whether the annuity received by each of the petitioners was a "bequest" which was exempt from income tax under section 213, or constituted distributive income which was taxable under section 219. This question depends upon the construction of the will of James Gordon Bennett. The seventh, eighth, and tenth clauses of that will bequeathed to the respective petitioners "an annuity." No limit is placed upon the payment of these annuities. The only direction is that they be paid. The whole estate is charged with their payment. The only way in which any part of the estate can be freed from this charge is found in the thirtieth clause

20 where the executors are given the power to convert property into money and where it is provided that the property "so sold, conveyed, * * * or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this, my will, or any codicil thereto." It is to be noted, however, that this very power of sale or conversion is given to the executors for, among other purposes, the payment of the annuities. So that, while the property sold is free of the charge, it is clear that the proceeds remain subject to the payment of the annuities.

Respondent invites our attention to the following excerpt from the thirtieth clause:

"I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me."

Giving this provision its broadest construction, it is apparent that there is nothing therein to the effect that any annuity is payable out of the income of the personalty so to be set apart. If such fund, if created, should fail, it is our opinion that the remaining corpus of the estate would remain liable for the satisfaction of the annuities. In those cases where it was the clear intention of a testator that an annuity should be paid out of income or out of a particular fund, such intention must be given full effect. See *Delaney v. Van Aulen*, 84 N. Y. 16, and *Irwin v. Woolport*, 128 Ill. 527; 21 N. E. 501. On the other hand, where an annuity is given without limitation and the will merely indicates that the annuity may be paid out of income, the corpus is liable when the income becomes insufficient. Thus, it

21 was said by Judge Denio in *Pierrpont v. Edwards*, 25 N. Y. 128, "The only question which I think it necessary to consider, in this case, is whether the bequest of the annuity of \$7,000 a year, to the testator's wife, was specific, in the sense that if it could not be paid out of the fund indicated—namely, the income of the trust estate—it was to fail, or to abate, in proportion that the indicated fund should prove deficient; or, on the other hand, whether it was intended by the testator that it should be paid; at all events the income of his property given to the trustees being pointed out by way, it is called, of demonstration. I am of opinion that the last-mentioned construction is the one which we are bound to place upon the instrument, * * * The leading principle of the cases is that when the testator bequeaths a sum of money, or which is the same

thing, a life annuity, in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be permitted to be overruled merely by a direction in the will that the money is to be raised in a particular way or out of a particular fund. (Sir James Wigram in *Dickin v. Edwards*, 4 Hare. 273.)”

Reading the will of James Gordon Bennett as a whole, it at once becomes apparent that the annuities which it bequeaths are charges upon its whole estate, income, personalty and realty. The James Gordon Bennett Memorial Home is a residuary legatee and devisee, and gets only what may be left after the annuity charges are paid.

That the annuities provided by the will are in fact bequests, seems clear. See *Pierpont v. Edwards*, *supra*; *Clark v. Clark*, 147 N. Y. 639; 42 N. E. 275; *Canal Bank v. Hudson*, 111 U. S. 66; 3 C. J. 202.

Are these annuities bequests of income within the meaning of section 219, or are they bequests as that term is used in section 213?

Long before the sixteenth amendment to the Constitution became effective, a broad distinction had been drawn between a bequest of a pure annuity and a bequest of income. Thus, it is said in section 2 of Chapter XIII of Remsen on the preparation and contest of wills (1907):

22 “An annuity is substantially different from a gift of the income or use of property. An annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.

“Annual taxes on principal are deducted from a use or income but not from annuities. * * *

“Where the testator sets aside a fund to provide for the payment of an annuity, his will should clearly indicate whether he intends the annuity to be a charge on the corpus or payable only out of the income. Thus, under ‘a clear gift of an annuity, a direction to set a fund apart to secure it, which is to fall into the residue upon the death of the annuitant,’ the corpus is still liable to make good arrears. ‘But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the corpus, and it is a simple case of tenant for life and remaindermen.’ So if it is clear that the annuity is to be paid only out of the income each year, or that the corpus is to be looked upon as an entirety after the annuitant’s death, the corpus will not be liable for arrears. In the absence of an expressed intent to the contrary the testator’s personal estate is primarily liable for the payment of an annuity. In some States it is provided by statute that, if the funds or property out of which annuities are payable fails, resort may be had to the general assets, as in case of a general legacy. Some testators provide for the purchase of annuities; some create a trust for their payment; others simply direct their payment out of the estate.”

In *Peck v. Kinney* (C. C. A.), 143 Fed. 76, it is said:

“There is this distinction between income and an annuity. The former embraces only the net profits after deducting all necessary

expenses and charges; the latter is a fixed amount directed to be paid absolutely and without contingency. *Ex parte McComb*, 4 Bradf. Suf. (N. Y.) 151, 152. 'An annuity is defined as "a stated sum, payable annually" (*Pearson v. Chace*, 10 R. I. 455), or as 'a yearly payment of a certain sum of money granted to another in fee, for life, or for years.' *Kearney v. Cruikshank*, 117 N. Y. 95, 22 N. E. 580; *Bartlett v. Slater*, 53 Conn. 102, 2 Atl. 678, 55 Am. Rep. 73.' *Goodyear Shoe Machinery Co. v. Dance*, 119 Fed. 692, 56 C. C. A. 300. It is a grant of a certain sum of money payable at the expiration of fixed, consecutive periods, for a definite term or for life. Lumloy's Law of Annuities, 1."

23 The court then quotes from the oft-cited case of *Booth v. Ammerman*, 4th Bradford, 129. From the last case we make the following excerpt:

"An annuity is a stated sum per annum, payable annually unless otherwise directed. It is not income or profits, nor indeterminate in amount varying according to the income or profits, though a certain fund may be provided, out of which it is to be payable. * * * The income or interest of a certain fund is not an annuity, but simply profits of certain property, to be earned, which may vary more or less."

To the same effect see *Dulaney v. Dulaney*, 105 Va. 429; 54 S. E. 40, and *Overton v. Lea*, 108 Tenn. 505; 68 S. W. 250.

From the above, three things become apparent: (1) That each annuity herein involved is in fact a bequest; (2) that these annuities do not constitute bequests of income; and (3) that each annuity is a charge upon the whole estate.

Since no income, nor any share of income, has been bequeathed to any one of the petitioners, it can not be held that such petitioner was entitled to a "distributive share of the income of the estate or trust," which is taxable under section 219. We can not see that the fact that the number of years during which a legacy is payable is determinable by the life of the beneficiary makes that income which otherwise is not income.

Respondent contends that these proceedings are governed by *Irwin v. Gavit*, 268 U. S. 161, and *Heiner v. Beatty*, 17 Fed. (2d) 743. In our opinion, these cases are not in point. In the *Gavit* case, there was a bequest of a certain share of income arising from a certain trust fund. In these proceedings, we have no bequests of income, but a bequest of a sum certain, payable at all events each year so long as the legatee lives. In the *Beatty* case the testator, Carnegie, did bequeath an annuity but he made the annuity payable

(in the case the executors did not purchase it from an insurance
24 company) out of the income of a trust fund. The Circuit Court of Appeals reversed the decree of two judges of the lower court (10 Fed. (2d) 390) holding the annuity exempt from income tax, but in so doing placed their decision squarely on the ground that the bequest was one of income from a trust. Thus the appellate court said:

"The first part of the Carnegie will with which we are concerned is the Fifth Article. It reads as follows:

"Fifth: I give to each of the persons hereinafter in this Fifth Article named an annuity of the annual amount in this Fifth Article set after his or her name, to be paid semiannually during the annui-

tant's life, that is to say, to * * * Mr. Beatty Art-Dept wife succeeding five thousand dollars.' "

"If the will had stopped there, it is possible the testator's provision for John W. Beatty would have been a bequest, payable in semiannual installments directly from the estate, and all payments made to him year by year would have been exempt from taxation under paragraph 3 of subdivision (b) of section 213 of the cited act (Comp. St. §6336 1/8ff). However, the will did not stop there, but, going on, it provided in the very next article, by words whose significance we have emphasized by italics, as follows:

"Sixth: I direct my executor and *trustee* either to *set apart, hold in trust, invest and keep invested, in separate funds, one for each annuitant*, sufficient sums to *produce* by the clear net interest and *income* thereof respectively, the several annuities provided in the Fifth Article of this will, * * * and to pay the said several annuities *from the interest and income of the respective funds* in semi-annual payments, *or* to purchase such annuities in life insurance companies. * * *

"By the Eighth Article the testator authorized his executor and trustee (who is one corporate person), 'in its discretion, to retain for investment of the principal of any of the *trusts*, herein provided for, any of the securities left by me.' And, finally, by the same article he authorized the executor and trustee to sell any of the securities coming into its hands and reinvest the proceeds.

"Recapitulating, these provisions created, somewhat inartificially, yet, we think with no lack of certainty, out and out trusts. They provided a capital sum for each annuitant, directed that it be 'set apart' and 'held in trust' for him and that from the interest and income therefrom accruing payment of a definite sum to be made to him semi-annually. Having all the earmarks of formal trusts, the executor and trustee, believing itself charged therewith, exercised the election given it to create capital trust funds by withdrawing from the body of the estate sufficient securities to produce the amounts to be paid annually to the more than forty annuitants. For John W. Beatty it took, 'set apart' and 'held in trust' one \$100,000 United States Steel Corporation Registered 50 year 5 per cent Gold Bond and two \$5,000 bonds of the same issue, and of the interest received therefrom it paid him \$5,000 a year. This is what was done. But the testator

25 directed, in the alternative and at the trustee's election, another way by which the trustee could provide for the payment of the annuities, namely, by taking a part of the principal of the estate and with it buy annuities. Thus, in both ways the testator willed that parts of the corpus of his estate be appropriated as capital sums from which income in amounts sufficient to pay the annuities could be obtained. In neither way—indeed, nowhere in the will—did he provide for payment of annuities from the principal of his estate. In other words, the testator, through alternative ways, specifically indicated and fully provided the sources of income to be paid the annuitants. What the will intended the annuitant here to receive and what actually he did receive was the income derived from a source which we think is sufficiently definite to fall within the statute's denomination of 'income derived from any source whatever.' "

We look in vain for a provision in the Bennett will similar to that in the Carnegie will. We find no bequest of income.

Respondent cites *Cummings' Executor v. Cummings*, 146 Mass. 501; 16 N. E. 401, to the effect that annuities such as those before us are payable primarily from income. The same would be true of any legacy, for no court would permit an executor to sell property to pay a legacy if he had income available. So also such a legacy is payable out of personalty rather than realty. All these are matters of administration with which annuitants have no concern.

Next, it is contended that since the annuities were paid in the taxable years involved, from income, the annuities constitute income. It may be noted that during the first two years after Bennett's death, all the annuities herein involved were paid out of the corpus of the estate. The same, for all we know, may be done later. It is because certain testators have thought that they had ample means to pay annuities and their expectations have failed that the cases which we have cited have arisen. The fact that income is used to pay an obligation does not necessarily make what was income to the payor income to the payee. The payment by one from his salary of
26 borrowed money without interest does not make the money so paid income to the recipient. Neither would the payment of a simple legacy from income of an estate make the legacy taxable as income.

Respondent calls our attention to the language of Mr. Justice Holmes in *Irwin v. Gavit*, *supra*, where he states that if the income therein involved was not taxable, Congress "has missed so much of the general purpose that it expresses at the start." We have not before us the question of the extent to which the income of the estate of James Gordon Bennett is taxable, and express no opinion on that question. All we have before us is whether these annuities constitute taxable income in the hands of the beneficiaries. But even if our decision should result in this income becoming nontaxable at all events, we can only say that this results from the provisions of the law. The Supreme Court, construing the same act that was construed in the *Gavit* case, held in *Smietanka v. First Trust & Savings Bank*, 257 U. S. 602, that income received by a trustee to be accumulated for unborn and unascertained beneficiaries was not taxable.

We are aware that the British courts have held that annuities similar to those here involved are subject to the British income tax, but in *Merchants Loan & Trust Co. v. Smietanka*, 255 U. S. 509, it was said:

"The British income-tax decisions are interpretations of statutes so wholly different in their wording from the acts of Congress which we are considering that they are quite without value in arriving at the construction of the laws here involved."

We have for application sections 213 and 219 of the revenue act of 1921. It is only by a strained construction that we can by any possible means arrive at the conclusion that these annuities are taxable under section 219, to the petitioners, as distributive income. On
27 the other hand, section 213 grants an exemption in cases of bequests. There is no doubt that each of these annuities is a bequest and there is no doubt that none of them is made payable by the will of James Gordon Bennett out of income. To hold that the mere fact that in the taxable years involved the annuities

were paid out of income and therefore were distributive income to the recipients would give a construction to the taxing statute far beyond the maning of the words used. When we are compelled to choose between clear words of exemption and a strained construction of a taxing provision, we accept that which is clear rather than that which involves doubt.

Judgment will be entered on 15 days' notice, under rule 50.

28 SMITH, dissenting: I perceive no valid distinction between this case and that of *Irwin v. Gavit*, 268 U. S. 161. That case arose under the revenue act of 1913, which imposed an income tax upon income "arising or accruing from all sources" and included "the income from but not the value of property acquired by gift, bequest, devise, or descent." During the years 1913, 1914, and 1915 Gavit received the income from a certain fund as a bequest. The court held that it was liable to income tax and said:

"But we think that the provision of the act that exempts bequests assumes the *gift of a corpus* and contrasts it with the income arising from it, but was not intended to exempt income properly so called simply because of the severance between it and the principal fund * * *. The money was income in the hands of the trustees and we knew of nothing in the law that prevented its being paid and received as income by the donee." (*Italics ours.*)

If the gift of a corpus is the "bequest" that is not liable to income tax then the petitioners in the case at bar did not receive a bequest. They simply received an annuity which, during the taxable year, was paid from the income of the estate. Clearly, under section 219(d) of the revenue act of 1921, the fiduciary making the estate income-tax return was entitled to deduct from gross income the amount of the annuity paid to each of the petitioners during the taxable year. Under the decision of the board neither the fiduciary nor the beneficiary can be held liable to income tax in respect of the income received.

Furthermore, under the decision of the court in *Irwin v. Gavit*, *supra*, the petitioners in the case at bar had an interest in the estate of the decedent and the income from that interest is liable to income tax the same as the income which Gavit received in the above-cited case.

Now October 4, 1928, the foregoing findings of fact, opinion, and dissenting opinion certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

29 UNITED STATES BOARD OF TAX APPEALS

Washington

Donald de Reuter, petitioner, v. Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order and decision redetermining deficiency

Pursuant to the decision of the board promulgated July 8, 1927, in the above-entitled proceeding, the commissioner having filed a

proposed final determination with notice of settlement and the petitioner having made no objection in such proposed determination, it is

Ordered, adjudged and decided: That there is no deficiency for the year 1923.

B. H. LITTLETON,
Chairman United States Board of Tax Appeals.

Dated, Washington, D. C., October 13, 1927.

Now, October 4, 1928, the foregoing order of redetermination certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

30

UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, respondent on review, *vs.* David H. Blair, Commissioner of Internal Revenue, petitioner on review. Docket No. 6243

Petition for review to the Court of Appeals of the District of Columbia

Now comes David H. Blair, Commissioner of Internal Revenue, by his attorneys, Mable Walker Willebrandt, Assistant Attorney General, and C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows:

I

The petitioner on review (hereinafter referred to as the commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States. The commissioner is informed and believes and upon such information and belief avers that Ronald DeReuter (hereinafter referred to as the taxpayer) is a nonresident alien and is a citizen and resident of France.

II

The commissioner determined a deficiency against the taxpayer in income tax for the year 1923 in the amount of \$1,470.00 and on June 19, 1925, in accordance with the provisions of section 274 of the revenue act of 1924, sent to the taxpayer by registered mail a notice of said deficiency. The taxpayer on August 14, 1925, filed an
31 appeal from the said notice of deficiency with the United States Board of Tax Appeals. In and by his said appeal the taxpayer alleged that the commissioner had erred in determining the deficiency aforesaid in that the commissioner determined that the sum of \$20,000.00 paid to the taxpayer in 1923 by the executors of the will of James Gordon Bennett, pursuant to the eighth clause of said will, constituted taxable income to the taxpayer under the revenue act of 1921.

James Gordon Bennett, a citizen of the United States and a resident of the State of New York, died on May 24, 1918, leaving a last will

and testament, which was duly admitted to probate in the Surrogates' Court for the County of New York, State of New York. In and by the eighth paragraph of said will the testator gave and bequeathed to the taxpayer an annuity of \$20,000.00, to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the date of the death of the testator. In said will the testator also made bequests of annuities in various amounts to other individuals, all of the said bequests of annuities being of similar tenor and in similar terms except as to the respective amounts thereof to the bequest of the annuity to the taxpayer.

In the twenty-ninth paragraph of said will the testator directed the executors of the will to cause to be incorporated a corporation, to be known as "The James Gordon Bennett Memorial Home for New York Journalists Corporation," which corporation should provide and maintain a home for indigent journalists, and in said paragraph the testator gave, devised, and bequeathed the entire residue of his estate to the said corporation to be formed. In the thirtieth

32 paragraph of said will the testator authorized the executors of the will to sell or otherwise dispose of any real or personal property of the estate for the purpose of paying legacies, annuities, debts, and expenses, and authorized said executors to retain and hold any personal property to provide for the payment of said annuities.

Up to November 14, 1920, all of the annuities provided for in said will were paid out of the corpus of the estate of said James Gordon Bennett. From and after said last-mentioned date all of said annuities were paid by the said executors entirely out of the income from said estate, and the annuity of \$20,000.00 paid to the taxpayer in 1923 was paid entirely out of said income. The said executors of the will of said James Gordon Bennett filed in the Surrogates' Court for the county of New York, State of New York, an intermediate account of their proceedings as such executors up to November 30, 1921, which account was thereafter approved by said court. In and by said account the said executors stated and showed, among other things, that on December 30, 1920, they, the said executors, permanently set aside certain bonds, mortgages, and other securities, constituting a large part of the estate at the time, as part of the residuary estate and as the property of the said James Gordon Bennett Memorial Home for New York Journalists Corporation, but under the control of the executors as security for the payment of taxes, annuities, or any other charges against the estate under the will and the income therefrom to be used for the payment of the annuities as far as may be necessary.

The hearing of this appeal of the taxpayer by the Board of Tax Appeals was held on December 1, 1926, which date was after the enactment of the revenue act of 1926. On July 8, 1927, the Board of

33 Tax Appeals issued its findings of fact and opinions in said appeal, wherein and whereby the board held that the annuity paid to the taxpayer in 1923 under the said will was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921. On October 13, 1927, the Board of Tax Appeals entered a final order of redetermination in said appeal wherein and whereby the board ordered and decided that there was no deficiency against the taxpayer for the year 1923.

III

The commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the commissioner, and the commissioner assigns the following errors, and each of them, which, he avers, occurred in the said record, proceedings, decision, and final order of redetermination and upon which he relies to reverse the said decision and final order of redetermination so rendered and entered by the Board of Tax Appeals, to wit:

1. The board erred in holding that the annuity paid to the taxpayer in 1923 was exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

2. The board erred in not holding that the annuity paid to the taxpayer in 1923 was not exempt from income tax under the provisions of section 213 (b) (3) of the revenue act of 1921.

3. The board erred in holding that the amount of the annuity paid to the taxpayer in 1923 constituted the value of property acquired by gift, bequest, devise, or descent within the meaning of section 213 (b) (3) of the revenue act of 1921.

34 4. The board erred in not holding that the amount of annuity paid to the taxpayer in 1923 did not constitute the value of property acquired by gift, bequest, devise, or descent, within the meaning of section 213 (b) (3) of the revenue act of 1921.

5. The board erred in not holding that the annuity paid to the taxpayer in 1923 was required to be paid entirely out of the income from the estate of James Gordon Bennett.

6. The board erred in not holding that the annuity paid to the taxpayer in 1923 constituted income of the estate of James Gordon Bennett during the period of administration or settlement of the said estate, which income was properly paid to the taxpayer and was distributable to the taxpayer during the year 1923, pursuant to the instrument or order governing the distribution thereof, and that such annuity constituted taxable income to the taxpayer, within the meaning and purview of paragraphs (c) and (d) of section 219 of the revenue act of 1921.

7. The board erred in not holding that the annuity paid to the taxpayer in 1923 constituted income of the estate or trust created under the will of James Gordon Bennett, which income was, pursuant to the will or order governing the distribution thereof, distributable to the taxpayer in said year and that such annuity constituted taxable income to the taxpayer, within the meaning and purview of paragraphs (a) (4), (d) and (e) of section 219 of the revenue act of 1921.

8. The board erred in not finding as a fact that the securities of the estate of James Gordon Bennett, set aside by the executors on December 30, 1920, were so set aside upon the following, among other, terms and conditions, to wit: That the income from said securities was to be used for the payment of the annuities provided for in the will as far as might be necessary.

35 9. The findings of fact made by the board are against the evidence.

10. The findings of fact made by the board are not supported by the evidence.

11. The decision of the board is not supported in law by the findings of fact made by the board.

12. The decision of the board is not supported in law by the evidence.

13. The board erred in redetermining that there is no deficiency in income tax against the taxpayer for the year 1923.

14. The board erred in not redetermining that the deficiency against the taxpayer in income tax for the year 1923 was the amount determined by the commissioner.

IV

The commissioner, being aggrieved and prejudiced by the said decision and order of redetermination of the Board of Tax Appeals, desires to obtain a review thereof by the Court of Appeals of the District of Columbia; wherefore he petitions that a transcript of the record be prepared in accordance with the rules of the Court of Appeals of the District of Columbia and transmitted to the clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the Court of Appeals of the District of Columbia.

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

36 DISTRICT OF COLUMBIA, ss:

C. M. Charest, being duly sworn says that he is General Counsel for the Bureau of Internal Revenue and as such is duly authorized to verify the above and foregoing petition for review to the Court of Appeals of the District of Columbia; that he has read the said petition for review and is familiar with the statements therein contained and that the facts therein stated are true, except such facts as may be stated on information and belief and those facts he believes to be true.

C. M. CHAREST.

Sworn and subscribed to before me this 5th day of April, A. D. 1928.

[SEAL.]

GEORGE W. KRITZ,
Notary Public, District of Columbia.

My commission expires Nov. 12, 1932.

37 STATE OF NEW YORK,
County of New York, ss:

Frederick K. Slanker, being duly sworn, deposes and says:

That he is an associate attorney in the office of the General Counsel, Bureau of Internal Revenue, being permanently assigned

to the New York office of the General Counsel, Room 522, Custom House, New York.

That by a letter from the General Counsel dated April 7th, 1928, deponent's office was requested to serve notice of appeal and copy of petition for review by the Court of Appeals of the District of Columbia of the decision of the United States Board of Tax Appeals in the case of Ronald DeReuter, petitioner, *vs.* Commissioner of Internal Revenue, respondent, B. T. A. Docket No. 6243, upon Frederick R. Coudert, Thomas W. Kelly, and Lorenzo Semple, all of 2 Rector Street, New York, N. Y., attorneys of record for the petitioner.

That on April 9th, 1928, deponent proceeded to serve and did serve a copy of the petition for review and a copy of the notice of appeal upon the aforesaid Thomas W. Kelly and at the same time the said Thomas W. Kelly did acknowledge such service upon the original of the said notice.

That he was then and there informed by the said Thomas W. Kelly that he and the aforesaid Frederick R. Coudert and Lorenzo Semple were all associated with the law firm known as Coudert Brothers, 2 Rector Street, New York, N. Y., and that the said Frederick R. Coudert and Lorenzo Semple were abroad and not within the United States.

That because of the foregoing deponent was unable to serve the said Frederick R. Coudert and Lorenzo Semple with a copy of the petition for review and a copy of the notice of appeal.

Further deponent sayeth not.

FREDERICK K. SLANKER.

Subscribed and sworn to before me this 12th day of April, 1928.

[SEAL.]

R. H. JACKMAN,

Notary Public No. 5, N. Y. County.

38

UNITED STATES BOARD OF TAX APPEALS

Ronald DeReuter, respondent on review, *vs.* David H. Blair, Commissioner of Internal Revenue, petitioner on review. Docket No. 6243

Notice

To:

FREDERICK R. COUDERT, Esq.,
2 Rector St., New York, New York.

THOMAS W. KELLY, Esq.,
2 Rector St., New York, New York.

LORENZO SEMPLE, Esq.,
2 Rector St., New York, New York.

Attorneys for Ronald DeReuter,

Respondent on Review.

Notice is hereby given to you and each of you that the Commissioner of Internal Revenue, petitioner on review in the above-entitled proceeding, did on the 7th day of April, A. D. 1928, file with the United States Board of Tax Appeals at Washington, D. C., a petition for review by the Court of Appeals of the District of Columbia of the decision rendered by said Board of Tax Appeals in said pro-

ceeding, a copy of which said petition for review as filed is herewith served upon you and each of you.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Service of the foregoing notice and of a copy of the petition for review mentioned in said notice is acknowledged this 9th day of April, A. D. 1928, by each of the undersigned attorneys for Ronald DeReuter, respondent on review in the above-entitled proceeding.

THOMAS W. KELLY.

Now, October 4, 1928, the foregoing petition for review and proof of service thereof certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

39 UNITED STATES BOARD OF TAX APPEALS

David H. Blair, Commissioner of Internal Revenue, petitioner on review, v. Ronald DeReuter, respondent on review. Docket No. 6243

Statement of evidence

The above-entitled appeal, together with the appeals of Henrietta D'Aramon, Docket No. 10644, and Sybil Whitehouse, Docket No. 13220, came on for hearing before the board on December 1, 1926, pursuant to written stipulations filed with the board by counsel for the parties in all three appeals. At the hearing it was stipulated between the counsel for all parties that the three appeals be consolidated for hearing and that the evidence in any appeal should apply as well to the others.

There was received in evidence the depositions of R. W. Candler and Rowland E. Cocks, witnesses on behalf of Ronald DeReuter, taken before Albert Gerber, a notary public in and for the County of New York in the State of New York, which depositions were taken pursuant to order duly entered by the board.

The deposition of R. W. Candler was as follows:

Direct examination:

I am a lawyer, residing at 14 Washington Square, New York City. I have a certified copy of the certificate of incorporation of the corporation known as The James Gordon Bennett Memorial Home for New York Journalists Corporation.

40 There was received in evidence, as taxpayer's Exhibit 1, a copy, certified to be correct by the clerk of New York County, State of New York and clerk of the Supreme Court, of the certificate of incorporation of The James Gordon Bennett Memorial Home for New York Journalists Corporation, which certificate of incorporation was signed and acknowledged by the incorporators of said corporation on May 10, 1919, approved by a justice of the Supreme Court of the State of New York on May 12, 1919, filed and recorded in the office of the secretary of the State of New York on May 16, 1919, and

filed and recorded with the clerk of New York County, State of New York, on May 17, 1919; to which certificate of incorporation was attached an order of the State Board of Charities of the State of New York, entered May 15, 1919, approving the incorporation of said The James Gordon Bennett Memorial Home of New York Journalists Corporation.

(Witness resuming):

I am secretary and treasurer and one of the directors of The James Gordon Bennett Memorial Home for New York Journalists Corporation. I have in my custody the minute book of the corporation, have transcribed or caused to be transcribed in that minute book all proceedings of the directors, and have attended the meetings of directors since its incorporation. The directors of the corporation have not taken any action or adopted any resolution for the dissolution of the corporation or the surrender of its charter. The minute
41 book contains no record whatever of the dissolution or contemplated dissolution of the corporation, and the corporation is still actively in existence.

There was no cross-examination.

The deposition of Rowland E. Cocks was as follows:

"I am personal trust officer of the Guaranty Trust Company of New York, which is one of the executors of the will of James Gordon Bennett. I am familiar with the proceedings of the Guaranty Trust Company as the executor of the James Gordon Bennett will and have followed the administration of the estate through since the appointment of this company as such executor in 1919."

"The Guaranty Trust Company has the custody or possession of the securities belonging to the James Gordon Bennett Estate. The funds or income of the estate pass through the accounts of the Guaranty Trust Company, and the company, as executor, keeps all the estate records, cash records, and security records. I am familiar with the accounts and records of the James Gordon Bennett Estate. I now produce a certified copy of the will of James Gordon Bennett, dated November 11, 1916."

There was received in evidence, as taxpayer's Exhibit 2, a copy of the will of James Gordon Bennett, certified to be a correct copy under the seal of the Surrogates Court of New York County, State of New York. The material provisions of the will were as follows:

"I, James Gordon Bennett, a citizen of the United States of America, and of the State of New York, and a resident of Number 37 West Forty-seventh Street, in the Borough of Manhattan, in the city of New York, hereby make, publish, and declare this to be my last will and testament as follows:

42 "First. I intend to leave at my death a will disposing of all my real and personal property situated in the Republic of France, and this will is not intended to in any way affect or dispose of any property situated in France disposed of by such other will, but it is my intention by this will to dispose of all property not disposed of by such will, which at the time of my death shall belong to me or be subject to my disposal by will.

* * * * *

"Third. I give and bequeath to my wife Maud an annuity of fifty thousand dollars to be paid to her in equal quarterly payments in each year during her life, reckoning the years from the time of my death, and I hereby declare that this provision is made to her in lieu of her dower and right of dower in all my real estate situated in the State of New York or elsewhere in the United States of America.

43 "Fourth. I give and bequeath unto my sister Jeanette Bell the sum of fifty thousand dollars and make no further provision for her because she is already amply provided for.

"Fifth. I give and bequeath unto my nephew Isaac Bell an annuity of thirty thousand dollars to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

"Sixth. I give and bequeath to my niece Norah, wife of Major Ricardo, late of the British Army, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt, in equal semiannual payments in each year during her life, reckoning the years from the time of my death.

"Seventh. I give and bequeath to my niece Henrietta, wife of Count Paul d'Aramon, an annuity of ten thousand dollars, to be paid to her personally, and upon her individual receipt, in equal semiannual payments, in each year during her life, reckoning the years from the time of my death.

"Eighth. I give and bequeath to my stepson Ronald de Reuter an annuity of twenty thousand dollars to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

* * * * *

"Tenth. I also give and bequeath to the said Sybel Douglas, wife of William Whitehouse, an annuity of five thousand dollars."

(In and by the eleventh to the twenty-fifth clauses, inclusive, the testator gave and bequeathed to various individuals annuities of various amounts, each of said bequests being in the same terms, except as to names and amounts, as the bequest in the tenth paragraph.)

"All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semiannual payments, reckoning from the time of my death.

"Twenty-sixth. I give and bequeath unto each and every one of my domestic servants who shall be in my employ at the time of my death, and to whom I do not give an annuity, a sum equal in amount to the amount of his or her wages for one year at the time of my death.

44 "Twenty-seventh: Each devise, bequest and annuity, given by the preceding articles of this my will, shall be over and above, and free from, any and all legacy, inheritance or transfer tax or taxes, or duty or duties, and I direct that any and all such tax or taxes, duty or duties, upon or in respect of or upon or in respect of the transfer of such devise, bequest, and annuity, shall be paid by my executors out of my estate as part of the expense of administration thereof, so that each devisee, legatee, and annuitant, shall receive the full amount of each devise, bequest or annuity hereby given to him or her, free from any such tax or duty.

45 "Twenty-eight: Each legacy or annuity hereby given to a woman now or hereafter married, shall be for her own separate use, and not subject to the debts or control of her husband. Each such legacy and annuity shall be payable to the legatee or annuitant in person only, and on her or his personal receipt, and shall be inalienable and not capable of anticipation, pledge, or transfer, in whole or in part, by the legatee or annuitant. All annuities hereby given shall commence at the time of my death and be payable in equal parts half-yearly, except as hereinabove specifically mentioned.

"Twenty-ninth: It is my long-cherished intention and purpose, and it is my will to establish a substantial, appropriate, and permanent memorial to my father, the late James Gordon Bennett, the founder and for many years the proprietor of the 'New York Herald,' and therefore to that end and to effectuate my said intention and purpose, I direct the executors of this my will hereinafter named and such of them as shall qualify and the survivors and survivor of them and their successors and successor, as soon as practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them, to cause or procure to be incorporated a corporation to be named 'The James Gordon Bennett Memorial Home for New York Journalists' in memory of my father, and for whom the same shall be a perpetual memorial, the general objects and purposes of which corporation, which shall, if possible, have perpetual existence, shall be to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who shall have been employed for at least ten years upon or by or in connection with any daily newspaper or journal which is now or shall be hereafter regularly published in the borough of Manhattan in the city of New York, and who shall by reason of old age, accident, or bodily infirmity, and through lack of means be unable to care for themselves or need such home or aid, each of which persons shall be nominated and recommended for the benefits of such home or for such aid by the proprietor or owner or publisher of any such newspaper or journal (whether an individual or a corporation) and shall be approved and accepted by the board of directors of such home in its uncontrolled discretion, and which board of directors shall always in the selection, approval, and acceptance of persons to receive the benefits of such home or such aid, give the preference to any person who shall be or shall have been employed by or associated with The New York Herald Company or The New York Herald Company Société

46 Anonyme Française upon or in connection with either the New York or the European edition of The New York Herald newspaper or the Evening Telegram Newspaper. The said Memorial Home Corporation shall establish and maintain a suitable building or suitable buildings and grounds and appurtenances to provide a home or homes for the persons so to be benefited or aided, and may also aid any such person or persons by pecuniary or other contributions or by pensions or otherwise as its board of directors may, in its uncontrolled discretion, from time to time deem best. And I give, devise, and bequeath all the rest, residue, and remainder of all the estate and property real and personal and of every kind and nature and wheresoever situated which shall belong to me or

be subject to my disposal at the time of my death, unto such The James Gordon Bennett Memorial Home for New York Journalists Corporation so to be formed, when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes; and all income of my said residuary estate and property which shall accrue after my death and until such Home Corporation shall be so duly incorporated and entitled to receive such residuary estate and property, I give and bequeath absolutely unto my friends Eugene Higgins and Rodman Wanamaker and James Stillman and to such of them as shall survive me. It is my desire and will that such Memorial Home Corporation shall own and as soon as the due administration of my estate shall permit, receive, and that it shall hold as long as practicable all capital stock of The New York Herald Company and The New York Herald Company Société Anonyme Française which shall belong to me at my death and form part of my residuary estate and property, and that by virtue of its ownership of such stock it shall from time to time elect such persons as directors of said The New York Herald Company and said The New York Herald Company Société Anonyme Française as shall continue to manage each of said companies and conduct the business and publication and management of The New York Herald newspaper in both its New York and European editions and The Evening Telegram upon the same principles and traditions and with the same policy and in the same manner so far as practicable, as the same shall be conducted at the time of my death. It is also my wish and hope and I request that the directors of said New York Herald Corporations shall so manage the business and affairs thereof as to accomplish such desire and to that end that they establish and set aside so much of the earnings and profits of said corporations or either of them as shall provide reserve or surplus funds sufficient in their judgment to provide for all possible contingencies of the business and to maintain the high standard, efficiency, independence, and wide influence of the newspapers

47 published by said corporation, and if deemed desirable to that end, to reduce the selling price of any of said newspapers or the charges for advertisements therein or to increase the costs of production by improvements in any of said newspapers, always having in view these objects rather than an increase of net profits. It is also my wish and hope that each of the executors of this my will hereafter named and each person who may at any time be an executor of my will, shall be and act as a director of such Memorial Home Corporation and a director of each of said corporations The New York Herald Company and The New York Herald Company Société Anonyme Française. It is also my will and I direct that each executor of this my will who shall act as a director of such Memorial Home Corporation shall be paid and receive as compensation for his services as such director and his services as a director of either or both of said New York Herald Corporations, if he shall also be a director of them or either of them, the sum of five thousand dollars per annum in addition to any commissions or compensations which he may receive or be entitled to for his services as an executor of this will.

“Thirtieth: I hereby nominate and appoint my friends—Eugene Higgins, Rodman Wanamaker, and James Stillman—to be the execu-

tors of this my will, and I request and direct that no bond or security for the performance of his duties be required of any of them or of any other executor of this my will and that each such executor may be permitted to act as such executor without giving any bond or other security. For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this my will or any codicil thereto. I authorize and empower said executors or

48 executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of The New York Herald Company or The New York Herald Company Société Anonyme Française unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said Memorial Home Corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will.

(Signed and witnessed on November 11, 1916.)

(Witness resuming:)

I am familiar with the terms of the will and with the eighth clause of the will by which the testator gave and bequeathed to Ronald DeReuter an annuity of \$20,000 to be paid in semiannual payments during each year of his life. I know that the sum of \$20,000 has been paid to Ronald DeReuter each year in accordance with that clause of the will. I know that the executors of the James Gordon Bennett estate have not set apart or constituted a separate trust or trust fund to produce or provide the sum of \$20,000 a year to pay the annuity to Ronald De Reuter. The will of James Gordon Bennett did not appoint any trustees.

Cross-examination:

All of the securities which I testified were in the possession of the executor are held by the Guaranty Trust Company to pay not only this annuity but other annuities in the will. I am sure that the

49 annuities for the year 1923 were paid out of the income from the securities in the possession of the executor.

Redirect examination:

The executors are holding the securities and assets constituting the estate of James Gordon Bennett.

There was received in evidence, as taxpayer's Exhibit 3, a copy, duly certified to be correct, of a decree or order entered on August 10, 1922, by the surrogate of New York County, approving and settling the intermediate account of the executors of the will of James Gordon Bennett down to and including the 30th day of November, 1921.

(Witness resuming):

The securities, which I testified are at present held by the executors, are held as set apart on their books for the residuary devisee and legatee, subject to the payment of taxes, annuities, and other charges, in the same manner as they were held in November, 1921.

(This concluded the deposition of Rowland E. Cocks.)

By agreement of counsel for all parties at the hearing, there was received in evidence, as an exhibit, a copy, duly certified to be correct, of the intermediate account of the executors of the will of James Gordon Bennett to November 30, 1921. The material portions of this account were as follows:

50

SUMMARY

As to the principal of said estate

The said executors charge themselves as follows:

With amount of—

Cash received from sales of real property as shown by Schedule A, Part II-----	\$753, 697. 18
Cash belonging to testator at the time of his death as shown by Schedule A, Part III-----	7, 071, 38
Cash received from sale of personal property and as shown by Schedule A, Part IV-----	1, 498, 972. 85
	<u>2, 259, 741. 41</u>

And they ask to be credited as follows:

With amount of—

Expenses on sale of real property as shown by Schedule B, Part I-----	\$1, 523, 051. 93
Expenses of administration as shown by Schedule B, Part II-----	202, 757. 37
Payments to creditors as shown by Schedule B, Part III-----	10, 692. 49
Legacies paid as shown by Schedule C, Part I-----	53, 646. 02
Payments from principal on account of an- nuities as shown by Schedule C, Part II-----	278, 500. 00
Proceeds of mortgages reinvested as shown by Schedule C, Part III-----	34, 741. 24
	<u>2, 103, 389. 05</u>

Leaving a cash balance of principal of----- 156, 352. 36

with which the said executors charge themselves as of November 30, 1921, the date to which this account is brought down.

As to the income of the said estate

The said executors charge themselves as follows:

With amount of—

Income received as shown by—

Schedule A, Part II-----	\$105,704.10
Schedule A, Part V-----	225,150.65

330,854.75

51 (Brought forward)----- 330,854.75

And they ask to be credited as follows:

With amount of—

Expenses as shown by Schedule B, Part IV----- \$42,832.68

Payments from income on account of annuities as
shown by Schedule C, Part II----- 209,175.31

Payments on account of The James Gordon Ben-
nett Memorial Home as shown by Schedule C,
Part IV ----- 21,120.00

273,127.99

Leaving a cash balance of income of----- 57,726.76

with which the said executors charge themselves as of November 30, 1921.

SCHEDULE A, PART II

A statement of all real property mentioned in Schedule A, Part I, sold by said executors, the details of such sales, the moneys received therefor, including principal and interest received on purchase money mortgages, and moneys received on instalment contracts.

Summary

	Purchase price	Cash paid	Original amount of bond and mortgage	Original amount of instalment contracts	Balance due	Interest received
Fort Washington property-----	\$1,722,800.00	\$624,810.00	\$1,159,750.00		\$1,097,990.00	\$105,597.85
Yonkers property-----	259,355.00	118,037.18	21,537.00	\$69,078.50	141,051.57	74.20
Miscellaneous-----	11,300.00	10,850.00	600.00		450.00	32.05
Total-----	1,993,455.00	753,697.18	1,181,887.00	69,078.50	1,239,491.57	105,704.10

52

SCHEDULE A, PART V

A statement of all moneys received by said executors on account of income derived from said estate, including all rents from said real property and all interest, dividends and other income received, except as set forth in Schedule A, Part II.

1918. (Various items, aggregating \$35.00.)

1919. (Various items, aggregating \$956.86.)

1920. (Various items, aggregating \$81,126.34.)

1921. (Various items, aggregating \$143,032.45.)

Total, \$225,150.65.

SCHEDULE B, PART IV

A statement of all moneys paid from income of said estate for necessary expenses properly chargeable thereto.

1919. (Various items, aggregating \$278.12.)

1920. (Various items, aggregating \$2,364.56.)

1921. (Various items, aggregating \$40,190.00.)

Total, \$42,832.68.

SCHEDULE C, PART II

53 A statement of all moneys paid on account of the annuities given and bequeathed in and by said will, and whether paid from principal or income of said estate and the amounts withheld therefrom to meet any income tax thereon.

Name, address, and period	Principal	Income	Tax withheld, principal	Tax withheld, income
Ronald de Reuter, 37 Avenue de Iena, Paris, France:				
1920				
Apr. 23. Payment to May 14, 1919.....	\$17,690.00	-----	\$2,310.00	-----
May 21. Payment to May 14, 1920.....	15,700.00	-----	4,300.00	-----
Nov. 17. Payment to Nov. 14, 1920.....	-----	\$7,100.00	-----	\$2,900.00
1921				
May 16. Payment to May 14, 1921.....	-----	9,250.00	-----	750.00
Nov. 14. Payment to Nov. 14, 1921.....	-----	8,440.00	-----	1,560.00

SCHEDULE C, PART III

A statement of the assets of said estate which have been permanently set aside to the James Gordon Bennett Memorial Home for New York Journalists Corporation, the residuary devisee and legatee under said will, but subject to taxes, annuities, and other charges.

On December 30, 1920, the said executors permanently set aside as part of the residuary estate and as the property of the James Gordon Bennett Memorial Home for New York Journalists Corporation, but under the control of the executors as security for the payment of taxes, annuities, or any other charges against the estate under the will and the income therefrom to be used for the payment of the annuities as far as may be necessary, the following securities, viz:

Summary of assets so set aside as aforesaid

Promissory notes of Frank A. Munsey Co.....	\$2,000,000.00
Bonds and mortgages on Fort Washington property, balance of principal due thereon.....	1,097,990.00
Bond and mortgage of Norman Countryman, balance of principal due thereon.....	450.00
\$34,900 U. S. Victory loan bonds, amount invested therein.....	34,741.24
Balance of cash uninvested.....	78.76
Total.....	3,133,260.00

54

SCHEDULE D

A statement of all real property mentioned in Schedule A, Part I, remaining unsold and of all personal property mentioned in Schedule A, Part III, remaining unsold or undisposed of, and of all other moneys, securities, and other personal property in the hands of the said executors on the 30th day of November, 1921, including the said assets so permanently set aside for the James Gordon Bennett Memorial Home for New York Journalists Corporation as aforesaid, with the appraised value of, the amount secured by, or invested in said personal property, and which said real and personal property constituted the balance of the estate of the said testator held by the said executors under said will on said date.

RECAPITULATION

REAL PROPERTY

Borough of Bronx, section 12, block 3376, lot 98

Yonkers lots unsold:

Lots 21 and 22, block 15, Map A.
 " 1-7 " 17, " B.
 " 1-11 " 1, " B.

Yonkers lots sold but sales not closed:

Balance of purchase price----- \$56, 828. 25

Personal property:

Personal and household effects, appraised value----- 8, 578. 95

Securities:

Appraised values thereof, amounts invested therein or due thereon ----- 3, 855, 975. 66

Moneys:

Balance of principal----- 156, 352. 36

Balance of income----- 57, 726. 76

Total ----- 4, 135, 461. 98

Retained by Title Guarantee & Trust Co.----- 3, 000. 00

55 There was offered in evidence on behalf of taxpayers a letter or notice sent by the Commissioner of Internal Revenue to the estate of James Gordon Bennett, relating to the liability of the estate for the Federal estate tax. Objected to as irrelevant, incompetent, and immaterial to any issue in these appeals. Objection sustained and exception taken and noted.

The above and foregoing statement of evidence is approved, settled, and allowed this 21st day of September, A. D., 1928.

JOHN B. MILLIKEN,

Member, United States Board of Tax Appeals.

The foregoing statement of evidence is approved.

(Sgd)

F. R. COUDERT,

(Sgd)

THOMAS W. KELLY,

Counsel for Ronald De Reuter.

Now, October 4, 1928 the foregoing statement of evidence certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

56

UNITED STATES BOARD OF TAX APPEALS

David H. Blair, Commissioner of Internal Revenue, petitioner on Review, *v.* Ronald De Reuter, respondent on review. Document No. 6243

PRAECIPE

To the clerk of the United States Board of Tax Appeals:

You will please prepare, transmit, and deliver to the Clerk of the Court of Appeals of the District of Columbia copies, duly certified as correct, of the following documents and records in the above-entitled cause in connection with the petition for review by the said Court of Appeals of the District of Columbia heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the board.
2. Pleadings before the board: (a) Petition, including annexed copy of deficiency letter; (b) answer.
3. Findings of fact, opinion, and decision of the board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of copy of petition for review.

5. The statement of evidence as settled and allowed.

6. Orders enlarging the time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

(Signed) C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

Now, October 4, 1928, the foregoing praecipe certified from the record as a true copy.

[SEAL.]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

57

UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, petitioner, *v.* Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order enlarging time

On motion of counsel for the respondent, it is

Ordered, That the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above-entitled proceeding in the Circuit Court of Appeals of the District of Columbia be and is hereby extended to July 8, 1928.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., June 6, 1928.

A true copy: Teste

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

58

UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, petitioner, *v.* Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order enlarging time

On motion of the respondent and for good cause shown, it is

Ordered, That the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals for the District of Columbia be and is hereby extended from July 8, 1928, to July 28, 1928.

(Signed) B. H. LITTLETON,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., June 29, 1928.

A true copy: Teste

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, petitioner, v. Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order enlarging time

For good cause shown, it is

Ordered, That the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals of the District of Columbia be and is hereby extended to August 8, 1928.

(Signed) B. H. LITTLETON,
Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., July 7, 1928.

A true copy: Teste

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, petitioner, v. Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order enlarging time

For good cause shown, it is

Ordered, That the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals of the District of Columbia be and is hereby extended from August 8, 1928, to August 22, 1928.

(Signed) JOHN M. STERNHAGEN,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., July 24, 1928.

A true copy: Teste.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, petitioner, v. Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order enlarging time

For good cause shown, it is

Ordered, That the time for filing certified copies of record papers *sur* petition for review of the above entitled proceedings in the Court

of Appeals of the District of Columbia be and it is hereby extended to September 1, 1928.

(Signed) JOHN M. STERNHAGEN,
Member, United States Board of Tax Appeals.

Dated Washington, D. C., August 13, 1928.

A true copy: Teste.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

62 UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, petitioner, *v.* Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order enlarging time

On motion of the respondent and for good cause shown, it is
Ordered, That the time for preparation of evidence and transmission and delivery of record papers *sur* petition for review of the above proceeding in the Court of Appeals of the District of Columbia be and it is hereby extended from August 22, 1928, to September 22, 1928.

(Signed) JOHN M. STERNHAGEN,
Member United States Board of Tax Appeals.

Dated Washington, D. C., August 22, 1928.

A true copy: Teste.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

63 UNITED STATES BOARD OF TAX APPEALS

Ronald De Reuter, petitioner, *v.* Commissioner of Internal Revenue,
respondent. Docket No. 6243

Order enlarging time

For good cause shown, it is
Ordered, That the time for filing certified copies of record papers *sur* petition for review of the above entitled proceeding in the Court of Appeals of the District of Columbia be and it is hereby extended to October 8, 1928.

(Signed) B. H. LITTLETON,
Member U. S. Board of Tax Appeals.

Dated Washington, D. C., September 21, 1928.

A true copy: Teste.

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[Indorsed on cover:] Board of Tax Appeals. No. 4848. David H. Blair, Commissioner of Internal Revenue, appellant, *vs.* Ronald De Reuter. Court of Appeals, District of Columbia. Filed Oct. 8, 1928. Henry W. Hodges, clerk.

FOR MR. JUSTICE VAN ORSDIEL

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

Nos. 4847, 4848 JAN 26 1929

Henry W. Hodges

**In the United States Court of Appeals
for the District of Columbia**

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVE-
NUE, APPELLANT

v.

HENRIETTA D'ARAMON

DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVE-
NUE, APPELLANT

v.

RONALD DE REUTER

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF ON BEHALF OF APPELLANT

MABEL WALKER WILLEBRANDT,
Assistant Attorney General.

SEWALL KEY,
Special Assistant to the Attorney General.

MORTON P. FISHER,
Special Assistant to the Attorney General.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue.

CLARK T. BROWN,
Special Attorney, Bureau of Internal Revenue, of Counsel.

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**In the United States Court of Appeals
for the District of Columbia**

No. 4847

DAVID H. BLAIR, COMMISSIONER OF INTERNAL
Revenue, appellant

v.

HENRIETTA D'ARAMON

No. 4848

DAVID H. BLAIR, COMMISSIONER OF INTERNAL
Revenue, appellant

v.

RONALD DE REUTER

APPEAL FROM THE BOARD OF TAX APPEALS

BRIEF ON BEHALF OF APPELLANT

PREVIOUS OPINION IN THE PRESENT CASE

The only previous opinion in the present cases is that of the United States Board of Tax Appeals (R. 9, No. 4847) and (R. 8, No. 4848), which is reported in 7 B. T. A. 600.

JURISDICTION

The appeals in these cases involve individual income taxes for the year 1923 of Henrietta D'Aramon in the amount of \$630 (R. 9, No. 4847) and of Ronald De Reuter for the year 1923 in the amount of \$1,470 (R. 8, No. 4848). The appeals are taken by the Commissioner of Internal Revenue from decisions (orders of redetermination) by the United States Board of Tax Appeals, entered October 13, 1927 (R. 21, No. 4847, and R. 20, No. 4848). The cases are brought to this Court by petitions for review filed on April 7, 1928 (R. 21, No. 4847; R. 24, No. 4848) pursuant to the Revenue Act of 1926 (c. 27, Sections 1001, 1003, 44 Stat. 9, 109, 110).

QUESTION PRESENTED

Is the amount of an annuity which is paid out of income of an estate, pursuant to the provisions of the testator's will, taxable income to the recipient under the Revenue Act of 1921?

STATUTES INVOLVED

The statutes involved are from the Revenue Act of 1921, c. 136, 42 Stat. 227, 237:

SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term "gross income"—

(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts

of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

(b) Does not include the following items, which shall be exempt from taxation under this title;

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the in-

come of estates, or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the

fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. * * *

STATEMENT OF FACTS

The taxpayers are nonresident aliens and citizens and residents of France. (R. 10, No. 4847, and R. 8, No. 4848.)

James Gordon Bennett, a citizen of the United States and a resident of the State of New York, died in France, May 24, 1918, leaving a last will and testament, the material provisions of which are set forth in the records. (R. 10-13, 27-31, No. 4847, and R. 8-12, 26-30, No. 4848.)

Under that will the testator provided for a number of annuities to be paid to various individuals. The portion of the will making a provision for the taxpayer, Henrietta D'Aramon, is as follows (R. 10, No. 4847) :

Seventh: I give and bequeath to my niece, Henrietta, wife of Count Paul D'Aramon, an annuity of ten thousand dollars, to be paid to her personally and upon her individual receipt,

in equal semiannual payments in each year during her life, reckoning the years from the time of my death.

The portion of the will making a provision for the taxpayer, Ronald De Reuter, is as follows (R. 9, No. 4848):

Eighth: I give and bequeath to my stepson, Ronald De Reuter, an annuity of twenty thousand dollars to be paid to him in equal semiannual payments in each year during his life, reckoning the years from the time of my death.

The will further provided:

All the above annuities mentioned in paragraphs ten to twenty-five of this my will shall be paid in equal semiannual payments reckoning from the time of my death. (R. 11, No. 4847; R. 9, No. 4848.)

In paragraph twenty-nine of the will, the testator stated that it had been his intention and purpose to establish a substantial and permanent memorial to his father, the founder of the New York Herald. To carry out this intention, paragraph twenty-nine of the will provided that the testator's executors should incorporate a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists." The general objects and purposes of the corporation were to provide and maintain a suitable and comfortable home or to provide pecuniary aid for certain persons employed by newspapers in the Borough of Manhat-

tan, City of New York. The will devised and bequeathed all of the residue of the estate of the testator to this corporation. All the income of the residuary estate prior to the formation of the corporation was given and bequeathed to Eugene Higgins, Rodman Wanamaker, and James Stillman. These three men were also named as executors.

The will provided (R. 13, No. 4847; R. 11, No. 4848) :

For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities, or for the execution of this my will, or for the administration of my estate or for any other purpose, I authorize and empower the executors or executor for the time being of this my will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease, or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases, and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange, or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased, or exchanged shall be free from all lien or charge of or by reason of any devise, bequest, or annuity given or made by this

my will or any codicil thereto. I authorize and empower said executors or executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. I especially request and charge said executors and executor not to sell or part with any of the capital stock of The New York Herald Company or The New York Herald Company Societe Anonyme Francaise unless it shall be absolutely necessary to do so, but to transfer all of such capital stock to said Memorial Home Corporation as part of my residuary estate when and as soon as practicable to do so in due course of the administration of my estate and the execution of this my will.

The annuities provided for the taxpayers were paid to them in 1923 by the executors of the will of the testator, out of the income of the estate. (R. 13, No. 4847; R. 12, No. 4848.)

In November, 1921, the executors filed in the Surrogate's Court for the County of New York, an intermediate account of settlement, which was thereafter approved by the court.

The account of settlement shows that on December 30, 1920, the executors permanently set aside as part of the residuary estate and as the property of the James Gordon Bennett Memorial Home for New York Journalists Corporation, but under the control of the executors, *as security for the payment*

of taxes, annuities, or any other charges against the estate under the will and the income therefrom to be used for the payment of the annuities as far as might be necessary, the following securities, to wit:

Promissory notes of Frank A. Munsey Co.....	\$2, 000, 000. 00
Bonds and mortgages on Fort Washington property, balance of principal due thereon.....	1, 097, 990. 00
Bond and mortgage of Norman Countryman, balance of principal due thereon.....	450. 00
\$34,900 U. S. Victory loan bonds, amount invested therein.....	34, 741. 24
Balance of cash uninvested.....	78. 76
Total.....	3, 133, 260. 00

(R. 13, No. 4847; R. 12, No. 4848.)

SPECIFICATION OF ERRORS TO BE RELIED UPON

The Commissioner urges in substance that the Board erred in holding that the annuities paid during 1923 were exempt as legacies under Section 213 (b) (3) of the Revenue Act of 1921 instead of holding that such payments were taxable income within the meaning of Sections 213 (a) and 219 (a) (d) of the Revenue Act of 1921.

ARGUMENT

I

Annuities paid out of income of estates are not exempt from taxation under the revenue act of 1921

During 1923, the taxable year in question, the executors of the will of James Gordon Bennett paid out of the income of said estate for that year to the taxpayers (beneficiaries) the annual payments required to be paid under the terms of the will. (R. 13, No. 4847; R. 12, No. 4848.)

Is such payment taxable income to such beneficiaries?

To determine the question, it is important first of all to turn to the statute itself as the basic source of information. And the statute must be examined in the light of all relevant provisions, for in this as in many other cases, examination of isolated excerpts tend toward the wrong impression.

Section 213 (a) of the Revenue Act of 1921, *supra*, provides that "gross income"—

(a) Includes * * * gains or profits and *income derived from any source whatever.* (Italics supplied.)

Section 213 (b) of the same Act provides that "gross income" does not include—

The value of property acquired by gift, bequest, devise, or descent (*but the income from such property shall be included in gross income*) * * * (Italics supplied.)

Section 219 (a) provides in part as follows:

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the *income of estates* or of any kind of property held in trust, *including—*

* * * * *

(4) *Income which is to be distributed to the beneficiaries periodically,* whether or not at regular intervals, * * *

* * * * *

(d) In cases under paragraph (4) of subdivision (a) * * * *the tax shall not be paid by the fiduciary, but there shall be in-*

cluded in computing the net income of each beneficiary that part of the income of the estate * * * for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not. * * *. (Italics supplied.)

From the foregoing, we glean the intention to tax income from any source (Section 213 (a)) including *income from estates* distributed to beneficiaries under the terms of the pertinent instrument providing therefor.

Section 213 (b), which exempts bequests from gross income, when read in the light of the other sections hereinbefore quoted, can not apply to bequests of *income*, but only to bequests of *capital*. (The authorities supporting this construction are analyzed in Part II of the Argument in this brief.)

Any other construction not only renders nugatory the provisions of Sections 219 (a) (4) and 219 (d) but would have the effect of granting absolute exemption to all income from estates periodically distributed to beneficiaries. Section 219 (d) provides that the fiduciary (executor) is not to pay the tax, and if taxpayer's theory is correct, the income is exempt as a bequest. In spite of the affirmative intention to tax such income as expressed in Sections 219 (a) (4) and 219 (d), therefore, an anomalous condition would arise defeating such purpose.

It is elemental that the statute is to be construed as a whole so as to give effect to its manifest pur-

pose and intent. *Price v. Illinois*, 238 U. S. 446, 450. Moreover, different provisions of a statute are to be reconciled, so far as practicable, so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each. *Cox v. Timm*, 182 Ind. 7, 13; *Bowman v. Hamlett*, 159 Ky. 184, 191; *State v. Coupe*, 91 Neb. 463, 467.

It is reasoned, therefore, that the statute was intended to tax as income to the beneficiary all of the income of an estate to be distributed to such beneficiary as such, exempting only bequests of capital which have already been reached by the estate tax, Congress intended to use its power to the full extent. *Eisner v. Macomber*, 252 U. S. 189, 203. Analysis of the authorities in the succeeding section of this brief support the foregoing construction.

The annuities in the taxable year in question were distributed to the taxpayers by the executors out of *income* of the estate (R. 13, No. 4847; R. 12, No. 4848), which income was earned by a capital fund set aside for that and other purposes (R. 34, No. 4847; R. 33, No. 4848).

As a matter of law (to be hereafter demonstrated), annuities are payable first out of income, and only out of capital when no income is available.

It is urged, therefore, that the annuities paid out of income in 1923 are taxable as income to the beneficiaries so receiving them under the terms of the statute.

II

Irwin v. Gavit, 268 U. S. 161; **Heiner v. Beatty**, 17 F. (2d) 743 (C. C. A. 3), affirmed; **Beatty v. Heiner**, 276 U. S. 598

The principles underlying the foregoing construction of the statute find support in *Irwin v. Gavit*, 268 U. S. 161, and *Heiner v. Beatty*, 17 F. (2d) 743 (C. C. A. 3), affirmed *Beatty v. Heiner*, 276 U. S. 598, and the Commissioner urges that these opinions are controlling in the present case.

In *Irwin v. Gavit*, *supra*, testator provided for the creation of a trust fund and the payment of part of the income therefrom to the taxpayer for life. Taxpayer urged that the payments were exempt as bequests. The argument was urged there by taxpayer as it will be here, that the payments were not income although paid out of income from the trust estate, because taxpayer received no interest in the corpus. The Supreme Court fully analyzed the whole problem, and its reasoning, although specifically applicable to the Revenue Act of 1913, is equally controlling under the Revenue Act of 1921. The Court said (p. 166):

The statute in Section II, A, subdivision 1, provides that there shall be levied a tax “upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States.” If these payments properly may be called income by the common understanding of that word and the statute has failed

to hit them, it has missed so much of the general purpose that it expresses at the start. Congress intended to use its power to the full extent. Eisner v. Macomber, 252 U. S. 189, 203. By B the net income is to include "gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise or descent." By D trustees are to make "return of the net income of the person for whom they act, subject to this tax," and by E trustees and others having the control or payment of fixed or determinable gains, &c., of another person who are required to render a return on behalf of another are "authorized to withhold enough to pay the normal tax." The language quoted leaves no doubt in our minds that if a fund were given to trustees for A for life with remainder over, the income received by the trustees and paid over to A would be income of A under the statute. It seems to us hardly less clear that even if there were a specific provision that A should have no interest in the corpus, the payments would be income none the less, within the meaning of the statute and the Constitution, and by popular speech. In the first case it is true that the bequest might be said to be of the corpus for life, in the second it might be said to be of the income. But we think that the provision of the act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income prop-

*erly so called simply because of a severance between it and the principal fund. No such conclusion can be drawn from *Eisner v. Macomber*, 252 U. S. 189, 206, 207. The money was income in the hands of the trustees, and we know of nothing in the law that prevented its being paid and received as income by the donee.*

*The Courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard those considerations as conclusive, as we have said, but if it were material a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes. * * * It is said that the tax laws should be construed favorably for the taxpayers. But that is not a reason for creating a doubt or for exaggerating one when it is no greater than we can bring ourselves to feel in this case. (Italics supplied.)*

In the *Heiner v. Beatty* case, *supra*, the will of Andrew Carnegie provided for certain annuities including one to the taxpayer. The will provided:

6. I direct my executor and trustee either to set apart, hold in trust, invest and keep

invested, in separate funds, one for each annuitant, sufficient sums to produce by the clear net interest and income thereof, respectively, the several annuities provided in the fifth article of this will, * * * and to pay the several annuities from the interest and income of the respective funds in semi-annual payments, or to purchase such annuities in life insurance companies. * * *

8. (2) I authorize my said executor and trustee, in its discretion, to retain for investment of the principal of any of the trusts, herein provided for, any of the securities left by me. * * *

I authorize it to sell any of the securities, or other property coming into its hands, at public or private sale, and upon such terms as to time and manner of payment as it shall deem best.

I authorize it to make new investments of the moneys coming into its hands in such securities as are sanctioned by the laws of the state of New York as proper investments for savings banks (here follows the designation of certain investments approved by the decedent which provision is undoubtedly intended to enlarge the rights of the executor and trustee with regard to the character of investments they might make). (See *Beatty v. Heiner*, 10 F. (2d) 390, 391.)

The executor under the Carnegie will, the Home Trust Company, elected not to purchase annuities from life insurance companies as authorized by paragraph 6 of the will, but instead elected, as

authorized by paragraph 8 of the will, to set aside certain 6 per cent United States Steel Corporation bonds belonging to the estate, the income on which was sufficient in amount to produce the annuity. (See *Beatty v. Heiner*, 10 F. (2d) 390, 391.)

The Circuit Court of Appeals for the Third Circuit held the amounts received were income, saying (*Heiner v. Beatty*, 17 F. (2d) 743, 744):

What the will intended the annuitant here to receive and what actually he did receive was income derived from a source which we think is sufficiently definite to fall within the statute's denomination of "income derived from any source whatever."

We are not unmindful that in construing a tax act its words must be followed, and that the law gives no latitude in gathering from the statutes a meaning which its words do not import. We are aware that there must be some ambiguity lurking in this and in like statutes because we find our views at variance with those of the learned judges who sat in the trial court. Moreover, the Supreme Court in construing a will, not unlike the one here in issue, in respect to liability for taxes, found its members not all of one mind; yet, we are constrained by the reasoning, illustrations, and inevitable inferences found in the opinion of that court, as well as by its judgment, in *Irwin v. Gavit*, 268 U. S. 161, 165-169, 45 S. Ct. 475; 69 L. Ed. 897, to hold that the moneys which came in to John W. Beatty, being income pro-

duced from a capital sum created specifically to produce it, was income within the meaning of the Revenue Act of 1918 and that his payment of the tax thereon assessed, being proper, can not be recovered in this suit.

The Supreme Court affirmed *Heiner v. Beatty*, *supra*, in *Beatty, v. Heiner*, 276 U. S. 598, on the authority of the decision in the *Gavit case*.

It appears to be conceded that annuities are paid primarily out of income. The adverse opinion of the Board so admits. (R. 19, No. 4847; R. 18, No. 4848.) And in *Cummings, Executor, v. Cummings*, 146 Mass. 501, the Supreme Court of Massachusetts said (p. 508):

The very nature of an annuity suggests, when those charged with the payment of it have in their hands a fund producing income sufficient to pay it, that the payment should be made from the income, and not from the principal. In this case the payments were to be made quarterly, and the income regularly accruing would naturally be expected to be used for them, rather than the sums deducted from the fund. It has been expressly held, that, where a testator gives an annuity without stating from what source it is to be paid, and then divides the rest of his estate among several persons, it is the duty of the executors before distributing the capital, either to appropriate a sufficient amount of the capital to purchase an annuity, or to reserve enough of it to yield an income amply sufficient to meet the annuity,

leaving such portion of the capital to be the subject of another distribution when the annuity has ceased.

Presumably, also, the testator knew the law.

The Board replies to this proposition by stating that ordinary legacies are also payable primarily out of income. *But the income from which they are paid is taxable income under Section 219 (a) (1) of the Revenue Act of 1921, supra.* The payment of legacies in that sense is analogous to the payment of dividends out of current income. Since the income is taxable, the dividends are not, because double taxation would result upon the same income. Congress merely chose to tax it in the hands of the corporation. In a like manner, income from estates is ordinarily taxable to the estate. When distributed periodically, however, it is taxable to the beneficiary. *But in either case, it is taxable income.*

The corpus of the estate was not diminished in the least by the payment of the annuity. It was not only paid out of income, but its nature partakes of the essence of income.

An annuity is defined as "an amount, especially of money payable yearly for a certain or uncertain period as for years, for life, or forever; *an annual allowance or income.*" *Webster's New International Dictionary.*

In *Re Dowding* (1904), 1 Ch. Div. 441, 445, the Court said:

A legacy is a sum which the legatee is entitled to have paid down; an annuity is a sum

which is to be secured by setting apart a portion of the settlor's personal estate, and has to be paid in the shape of an annual payment; and in that sense it is not a legacy.

We have, therefore, payments actually paid out of income in the year in question; partaking of the nature of income; required to be paid primarily out of income as a matter of law; taxable as income under the affirmative provisions of the statute; payments which did not reduce corpus. Yet the Board would grant total exemption because of its construction of the word "bequest," isolated from the remainder of the statute—a construction utterly inconsistent with the well understood purpose of the Revenue Acts.

It is urged that *Irwin v. Gavit*, *supra*, and *Heiner v. Beatty*, *supra*, are indistinguishable in principle from the present case, and must be controlling.

It need only be added that taxpayers attempt to invoke an exemption, and the statute is therefore to be strictly construed against the taxpayer.

In the case of *Cornell v. Coyne*, 192 U. S. 418, the Court laid down the rule (p. 431):

But if there be any doubt as to the proper construction of this statute, * * * then that construction must be adopted which is most advantageous to the interests of the government. *The statute being a grant of a privilege, must be construed most strongly in favor of the grantor.* (Italics supplied.)

This doctrine followed a previous similar ruling in the case of *Swan & Finch Co. v. United States*, 190 U. S. 143, and has been followed in *Hubbard-Ragsdale Co. v. Dean*, 15 F. (2d) 410; *Thomas E. Basham Co. v. Lucas*, 21 F. (2d) 550, and many other cases to which it is unnecessary to refer.

III

The board's opinion

The decision of the Board reversing the Commissioner was not unanimous. Smith, Member, in dissenting (R. 20, No. 4847; R. 19, No. 4848) relied on *Irwin v. Gavit, supra*, emphasizing the words of the Supreme Court to the effect that "the provision of the act that exempts bequests assumes the *gift of a corpus* and contrasts it with the income arising from it, but was not intended to exempt income properly so called simply because of the severance between it and the principal fund * * *."

The majority opinion (by Milliken, Member, R. 14, 4847; R. 12, No. 4848) takes great pains to establish the proposition that if an annuity is not expressly limited to payments from income, it is a charge upon the corpus, *and, although payable primarily out of income, may be payable out of corpus if the income fails*. As an academic and isolated proposition of law, this is undoubtedly correct. The error is the conclusion reached by the majority from this premise; i. e., that because the annuity *may in the future be payable out of corpus*, even

those payments properly paid out of income must be exempt under the statute. The majority admit that if part of the corpus is required to be set aside as a trust under the will, with the provision that only the income earned upon such trust be paid to the beneficiary, such payments are income. They rule, however, that amounts paid out in any other less formal way, though primarily and actually paid out of income (and intended so to be paid) undergo a change of form and become exempt. In doing so they ignore two principles expressed by the Supreme Court in *Irwin v. Gavit, supra*, viz: “* * * a gift of the income of a fund ordinarily is treated by equity as creating an interest in the fund,” and that the act, in exempting bequests “assumes the gift of a corpus and contrasts it with the income arising from it.”

The suggestion that legacies, too, are primarily paid out of income has already been answered in Part II of the Argument of this brief. Such income is first taxable in the hands of the fiduciary. *All income from estates is taxable in the hands of the fiduciary unless paid periodically to the beneficiary, in which case it is taxable to the beneficiary.* No ordinary income of estates is exempt.

The majority opinion fails to support with reasoning its conclusion by which income, paid as such and intended to be so paid, is to be exempt from tax notwithstanding Congress' express intention to the contrary.

CONCLUSION

It is urged that income from estates, paid periodically to beneficiaries designated in the will, is taxable under the affirmative provisions of the statute. The exemption of bequests contemplates a bequest of capital as contrasted with income. All *income* from estates is taxable.

Irwin v. Gavit, supra, is indistinguishable in principle and therefore controlling. The error in the majority opinion of the Board consists in drawing a *non sequitur* from a correct premise.

Respectfully submitted.

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JANUARY, 1929.

FOR MR. CHIEF JUSTICE MARTIN.

COURT OF APPEALS
~~DISTRICT OF COLUMBIA~~
FILED

APR 15 1929

IN THE

United States Court of Appeals,

Henry W. Hodges
Clerk

FOR THE DISTRICT OF COLUMBIA.

No. 4847.

DAVID H. BLAIR, Commissioner of Internal Revenue,
Appellant,

against

HENRIETTA D'ARAMON,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

ROBERT W. CANDLER,
THOMAS GARRETT, JR.,
MARION N. FISHER,
Counsel for Appellee.

New York, N. Y.,
April 12, 1929.

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IN THE
United States Court of Appeals,
FOR THE DISTRICT OF COLUMBIA.

DAVID H. BLAIR, Commissioner of
Internal Revenue,
Appellant,

against

HENRIETTA D'ARAMON,
Appellee.

No. 4847

BRIEF ON BEHALF OF APPELLEE.

Statement of the Case.

This is an appeal by the Commissioner of Internal Revenue from a decision and order of redetermination of the United States Board of Tax Appeals entered on October 3, 1927 (R., 21), involving Federal income taxes for 1923 in the sum of \$630.00. The case was brought to this court by the Commissioner's petition for review filed April 7, 1928 (R., 21), under the provisions of Sections 1001 and 1003 of the Revenue Act of 1926 (44 Stat. 9, 109, 110).

The question presented is whether or not the annuity of \$10,000 bequeathed by James Gordon Bennett to his niece, Henrietta D'Aramon, by the seventh clause of his will constitutes income to her.

Statement of the Facts.

The appellee is and at all times pertinent was a non-resident alien, a subject and resident of France (R., 10). By the seventh clause of the will of James Gordon Bennett, a citizen of the United States, and a resident of the State of New York, who died in France on May 24, 1918, she was entitled to receive an annuity of \$10,000.00 reckoned from the date of the testator's death (R., 10). The appellee was one of a large number of annuitants specified in decedent's will (R., 10). In addition to the aforementioned annuities the testator's will required that there be incorporated "as soon as practicable" after testator's death a charitable institution to be named "The James Gordon Bennett Memorial Home for New York Journalists", the purpose of which was to provide and maintain a home or provide pecuniary aid for needy journalists, particularly those who had been employed by the New York Herald Company and the New York Herald Company Société Anonyme Francaise. For the creation of this home the entire residue of testator's estate of every nature was devised and bequeathed to it "when and as soon as the same shall be duly incorporated" (R., 11, 12). The will further provided that all income of the residuary estate and property which should accrue after the testator's death and until the incorporation of the home should go to his friends, Eugene Higgins, Rodman Wanamaker and James Stillman, with right of survivorship (R., 12). It directed that the testator's stock in the New York Herald Company and the New York Herald Company Société Anonyme Francaise, which constituted a large portion of the estate, should go to the home and should not

be sold unless absolutely necessary (R., 12). The James Gordon Bennett Memorial Home for New York Journalists Corporation was organized under the laws of New York in May, 1919 (R., 13). The executors, however, were empowered and authorized to retain and hold any personal property that might be necessary for the payment and satisfaction of any annuity given by the testator (R., 13). The account of settlement of the executors on December 30, 1920, shows that they had permanently set aside to the home corporation the residuary devisee and legatee but subject to taxes, annuities and other charges, the following assets: (R., 13)

Notes of Frank A. Munsey Com-	
pany	\$2,000,000.00
Bonds and mortgages on real es-	
tate sold	1,098,440.00
United States Victory Loan Bonds	34,741.24
Cash.	78.76
	\$3,133.260.00

The provisions of the will that are here pertinent are quoted in the record on pages 10 to 13, inclusive. This and other annuities were paid by the executors out of the corpus of the estate until November 14, 1920, after which this annuity and most of the others were paid from income. The total amount of the annuities payable in the year 1920 was \$144,000 (R., 13).

Statutes Involved.

Revenue Act of 1921:

“Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) the term ‘gross income’—

“(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme Court and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The amount of all such items (except as provided in subdivision (e) of section 201) shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under subdivision (b) of section 212, any such amounts are to be properly accounted for as of a different period; but

“(b) Does not include the following items, which shall be exempt from taxation under this title.

* * * * *

“(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income). * * *

“Sec. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust including—

"(1) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *

"(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

"(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section, except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases the estate or trust shall, for the purpose of the normal tax, be allowed the same credits as are allowed to single persons under section 216.

"(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for

its taxable year ending within the taxable year of the beneficiary."

"Sec. 213(c). In the case of a non-resident alien individual, gross income means only the gross income from sources within the United States, determined under the provisions of section 217."

"Sec. 217(a). That in the case of a non-resident alien individual * * *, the following items of gross income shall be treated as income from sources within the United States:

"(1) Interest on bonds, notes, or other interest bearing obligations of residents, corporate or otherwise, * * *;

"(2) The amount received as dividends (A) from a domestic corporation * * *, or (B) from a foreign corporation unless * * *;

"(3) Compensation for labor or personal services performed in the United States;

"(4) Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, goodwill, trade-marks, trade brands, franchises, and other like property; and

"(5) Gains, profits, and income from the sale of real property located in the United States."

SYNOPSIS OF ARGUMENT

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I.

THE ANNUITY OF \$10,000.00 TO HENRIETTA D'ARAMON IS PROPERTY ACQUIRED BY GIFT OR BEQUEST, THE VALUE OF WHICH MAY NOT BE INCLUDED IN TAXABLE INCOME.

1. *To tax the annuity would result in double taxation not intended by the statute.*

2. *A gift or bequest of an annuity is indistinguishable for tax purposes from a purchased annuity which does not produce taxable income until the cost has been recovered.*

3. *Exclusion of the annuity from taxable income, until the value has been recovered, does not result in the escape from taxation of income otherwise taxable.*

II.

THE CASES OF IRWIN V. GAVIT AND HEINER V. BEATTY DISTINGUISHED.

III.

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IV.

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ARGUMENT.

Preliminary Considerations.

We venture to present briefly at the outset certain well established general principles preliminary to consideration of the specific question involved and the specific points arising thereunder.

Congress cannot tax as income that which is not income within the meaning of the constitutional amendment. All statutes enacted pursuant to the constitution are subordinate to it and to the extent that any revenue act or any regulation thereunder exceeds the constitutional amendment it is invalid. *Eisner v. Macomber*, 252 U. S. 189; *Kerbaugh-Empire v. Bowers*, 271 U. S. 170; *Pitney v. Duffy*, 291 Fed. 621, aff'd. 2 Fed. (2nd) 230.

Gifts, whether *inter vivos* or by will, do not constitute income subject to taxation. This statement, which does not need any authority in its support, is recognized in every revenue act that has been enacted pursuant to the constitutional amendment and is extended by all acts to include property acquired from an intestate by descent. However, all of the revenue acts provide that "income" from property so received shall be included in taxable income. This would seem to be a purely precautionary provision not essential in statutes otherwise taxing all income "from any source whatever". Thus the distinction between a gift and the income from such gift is sometimes presented for determination. However, it is clear that the value of the thing or property transmitted by gifts *inter vivos*, will or intestacy is not taxable income. On the other hand where the property so transmitted is an interest in a corpus or fund, an estate such as

a life estate or other terminable right to the use of the property, the income flowing from such estate or interest in property is taxable as "growing out of the * * * use of or interest in property". Section 213 (a) Revenue Act 1921; *Irwin v. Gavit*, 268 U. S. 161; *Heiner v. Beatty*, 17 Fed. 2nd, 743; aff'd. 276 U. S. 598.

Notwithstanding the use of the word "exempt" in Section 213 (b), it is not a provision for exemption to be strictly construed against the taxpayer, as contended by the Government in its brief at pages 20 and 21, but merely defines what is not taxable income. *United States v. Merriam*, 263 U. S. 179, 188; *United States v. Supplee-Biddle Co.*, 265 U. S. 189, 194. In the *Merriam* case the Supreme Court construing the 1913 Act, which defines income as including among other things "the income from but not the value of property acquired by gift, bequest, devise or descent", applied the rule of liberal construction rather than strict construction, citing the familiar case of *Gould v. Gould*, 245 U. S. 151. In the *Supplee-Biddle* case the Supreme Court, construing Section 233 (b), of the Revenue Act of 1918, which reads in part, "does not include the following items, which shall be *exempt* from taxation under this title:", the identical language used in Section 213 (b) of the 1921 Act, had the following to say:

"Nor do we find any difficulty with the expression in paragraph (b) which *exempts* proceeds of life insurance from gross income. The word is used not to indicate that they would be otherwise included in the income to be taxed, but only to make clear that the gross income does not include them."

The introductory paragraph of Section 213 (b) applies with as much force to "gifts, bequests and devises" as it does to "proceeds of insurance". If it is not an exemption to be strictly construed for the latter then it is not to be strictly construed for the former.

Running through the Government's brief, to which more specific reference will be made hereinafter, appears the proposition that because a designated payment is made out of income then the recipient of the payment realizes income. This is a grossly erroneous premise. There is no necessary relation between the source of the payments and their character in the hands of a recipient. If A repays borrowed money to B from income, obviously B does not realize income upon repayment merely because A paid it from his income. Conversely, if A pays a salary to his employee out of corpus, the fact that A's capital was depleted by the payment does not prevent the employee from receiving income by way of compensation for services. In short, there is no necessary relation between the source of a payment and its taxability in the hands of the payee; and funds cannot be earmarked either to impose the tax or to escape the tax.

The foregoing error of earmarking the source of funds occurs primarily in instances of payments by executors from the income of estates. Section 219 (a) (4) provides that the income tax shall apply to the income of estates including income which is to be distributed to the beneficiaries periodically whether or not at regular intervals. Section 219 (c) provides that in such cases there may be deducted from the income of the estate in determining net income subject to taxes the amount of any in-

come properly distributed to any beneficiary; but Section 219 (d) provides in substance that where such deduction is permissible the tax on the amount thereof shall be paid by the fiduciary.

In applying the foregoing provisions, it is sometimes argued, as in this case, that the fact that a sum of money payable to a beneficiary is legally paid from income of the estate authorizes the taxation of such sum in the hands of the beneficiary. But, as pointed out above, such a result does not follow. For example, a bequest of \$1000 should be paid from income before resorting to corpus if there is adequate income for that purpose; but, obviously, it does not follow either that the estate may deduct such payment from its taxable income or that the beneficiary should be taxed on his bequest. If the \$1000 was payable in a number of equal annual payments the bequest of periodic payments should likewise be paid from income if possible, but the payments are obviously not income to the beneficiary and equally they are not deductions from the income of the estate under Section 219. In other words, Section 219 only permits the deduction by an estate of *distributions* of income required by the will to be distributed *as income* and requires the taxation of such distribution to the beneficiary. This is the only relation of cause and effect between income of an estate and income of a beneficiary for income tax purposes.

I.

The annuity of \$10,000.00 to Henrietta D'Aramon is property acquired by gift or bequest the value of which may not be included in taxable income.

Section 213(a) of the Revenue Act of 1921 defines in all inclusive terms what constitutes income. Section 213(b) then provides, however, that income as previously defined does not include:

“The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income); * * *.”

The word “gift” is of broad application and includes all voluntary transfers of property without consideration. *Schouler on Wills*, 6 Ed. Vol. 1, Sections 3-5. The term “bequeath” is that generally employed to effect a gift by will of personal property. And the property “bequeathed” is a “legacy”. *Page on Wills*, Section 2; *Campbell's Estate*, 75 Pac. 851. The meaning intended by Congress in the use of the terms “gift, bequest, devise or descent” is that established by settled rules of construction. *Merriam v. United States*, 282 Fed. 851, 855, aff'd. 263 U. S. 179. The statute, therefore, excludes from income the value of any legacy acquired by the beneficiary.

That an annuity given by will is a legacy and therefore property acquired by bequest is not susceptible of question.

Canal Bank v. Hudson, 111 U. S. 66;
Peck v. Kinney, 143 Fed. 76;
Budd v. Budd, 59 Fed. 735;

Clark v. Clark, 147 N. Y. 639; 42 N. E. 275, 276;

Booth v. Ammerman, 4 Brad (N. Y.), 129;
Matter of Toms, 84 Misc. (N. Y.), 312.

An annuity is a fixed amount directed to be paid absolutely and without contingency, payable annually unless otherwise directed. It is clearly distinguishable from the income or use of property. An annuitant does not have a life or terminable estate or interest in property but has an absolute claim for the amount of the annuity.

In New York, the state of Mr. Bennett's residence and the state in which his will was probated, the meaning of the term "annuity" has been clearly defined judicially. In *Matter of Kohler*, 193 App. Div. New York 8, 20, the Court said:

"Surrogate Bradford more than sixty years ago gave the definitions of and the distinction between annuities and an annual payment out of profits which has been cited with approval by the courts of this and many other States, in *Booth v. Ammerman* (4 Bradf. 129, 133): 'An annuity is a stated sum per annum, payable annually unless otherwise directed. *It is not income or profits*, nor indeterminate in amount varying according to the income or profits, though a certain fund may be provided, out of which it is to be payable. * * * The income or interest of a certain fund is not an annuity, but simply profits of certain property, to be earned, which may vary more or less.' "

In harmony with the foregoing is the treatment of the question of annuities in Section 2, *Remsen on the Preparation and Contest of Wills* (1907):

"An annuity is substantially different from a gift of the income or use of property. An

annuity is a fixed amount directed to be paid absolutely and generally without contingency. An income embraces only the net profits after deducting all necessary expenses and charges, and consequently is uncertain in amount.

"Annual taxes on principal are deducted from a use or income but not from annuities. An annuity is presumed to be for life, unless otherwise expressed. It may be given to two or more persons with right or survivorship, as to a husband and wife 'during their natural lives.' * * *

"Unless otherwise provided by statute or testamentary provision, annuities are payable at the end of one year from the death of the testator. * * *

"Where the testator sets aside a fund to provide for the payment of an annuity, his will should clearly indicate whether he intends the annuity to be a charge on the corpus or payable only out of the income. Thus, under 'a clear gift of an annuity, a direction to set a fund apart to secure it, which is to fall into the residue upon the death of the annuitant,' the *corpus* is still liable to make good arrears. 'But if there is a direction to set apart a sum of money in order to pay an annuity out of the dividend with a gift over, the annuitant is not entitled to come upon the *corpus*, and it is a simple case of tenant for life and remaindermen.' So if it is clear that the annuity is to be paid only out of the income each year, or that the *corpus* is to be looked upon as an entirety after the annuitant's death, the *corpus* will not be liable for arrears. * * * Some testators provide for the purchase of annuities; some create a trust for their payment; others simply direct their payment out of the estate."

See also,

Pierrepoint v. Edwards, 25 N. Y. 128;

Peck v. Kinney (C. C. A.), 143 Fed. 76.

No authority is required to show that an annuity, whether for life or a term of years, is readily capable of valuation. Insurance companies daily sell annuities for a fixed premium. In the settlement of estates annuities are often purchased or annuitants are paid the value of their annuities in satisfaction of their claims against the estates. And the Federal Government for estate tax purposes regularly values annuities as of the date of death in order to determine the value of the net estate subject to taxation. The method used by the Federal Government is that commonly employed, namely, by the use of mortality tables showing the years of expectancy of the annuitant and the present worth of an annuity of \$1.00 per year throughout the expectancy discounted at a given per cent. (Article 15, Regulations 63, Relating to Estate Tax under the Revenue Act of 1921.)

From the foregoing, it appears that annuities, from the standpoint of source of payment, may fall into three classes: (1) purchased annuities, (2) annuities to be paid from the income of a fund set aside and invested, and (3) annuities with no specific provision for payment but which are a charge upon the whole estate. We are not concerned with the first class except for purposes of illustration. As to the second class there frequently arises a question of whether a so-called annuity is a true annuity or a mere estate or interest in the fund invested to produce an income from which to pay it, and therefore, whether or not the annuitant is entitled to receive only up to the income of the fund invested or may come upon the *corpus*. In the case of the third class of annuities, however, it is clear that they constitute a charge upon the entire estate and that the annuitant does not take a life estate

or other terminable interest in property with the right to the income therefrom. In the case of *Clark v. Clark*, 147 N. Y. 639, 42 N. E. 275, the testator gave property in trust to secure an annuity left his widow and advances to be made to his children, such trust to continue until the youngest child should reach his majority. At the end of the youngest child's minority it was contended that a trust must continue to secure the payment of the annuity to the widow. The Court said, on page 275:

"The evident scheme of the will, therefore, was to put all the property in trust until the youngest child should reach his majority and then end the trust and give the estate over to the children, subject only to the further payment of the widow's annuity. It may be admitted that a trust to secure that payment might have been convenient, but it was certainly not necessary. The annuity was a legacy, in a possible contingency charged upon the land, but still a legacy which the executors could pay in the orderly and proper performance of their official duty, and which did not make necessary the prolongation of the trust. There was an abundance of personal property at testator's death to furnish the capital which would produce the income, and he deliberately chose, by the language used, to put the widow at first in the attitude of a trust beneficiary, while a trust was needed to enable advances to be made to the children, but when that necessity disappeared, through the direct gift to the children, to *leave her a legatee, having for her security a charge upon the property.* * * *

"It is then said that, if there was no trust there was, at least, a power in trust. But no power, as such, was conferred or sought to be conferred. *All that we find is a legacy of an annuity and a duty of paying it imposed upon executors,—a duty which they were perfectly*

able to perform by force of their official character, as they were situated when the will took effect. * * * *That legatee, of course, took no life estate in the property held by the executors, as the appellant further contends, but simply held the right to be paid the annuity out of the assets in their hands.*" (Italics ours.)

One of the questions involved in the *Clark* case was the nature of the estate of surviving children when the testamentary trust terminated. Dealing with this question, the Court said on page 276:

"I see no reason, therefore, to doubt that when Robert came of age, in 1876, the trust term ended, and the property vested in the four children, subject to the charge upon it of the widow's annuity and the necessary postponement of the ultimate possession. At that date, therefore, the plaintiff's husband became seised of an undivided fourth part of the estate, subject, it may be conceded, to the lien upon it of the widow's annuity in case of deficiency."

No trust was essential in the *Clark* case for the protection of the annuitant and the same may be said with respect to the Bennett Estate. To constitute such a trust there must be three elements present, namely, a trustee, an estate bequeathed or devised to him, and a beneficiary. *Greene v. Greene* 125 N. Y. 507.

The will of James Gordon Bennett in the seventh clause provided for the payment of the annuity in question. It also provided for the payment of many other annuities. It did not provide for payment out of income of any fund, nor did it, by implication or otherwise, set up a trust to secure the payment. No trust was necessary, and the annuities constituted a charge upon the entire estate. Henrietta D'Aramon did not possess a life or terminable interest in

any corpus, but she was the possessor of a claim against the estate secured by a lien thereon. *Clark v. Clark, supra*. The Home Corporation was seised of the entire estate left after payment of expenses and specific bequests, subject to the lien of this and the other annuities. Not only is the foregoing true as a matter of law, but also it is apparent that such was the intention of Mr. Bennett. He provided that until the Home should be incorporated, the entire income of the estate should go to his three friends, Eugene Higgins, Rodman Wanamaker and James Stillman. He bequeathed and devised the entire residue of his estate to the Home "when and as soon as the same shall be duly incorporated, to be used and applied for its corporate purposes." Thus the will provided (page 12), "all income of my said residuary estate and property which shall accrue after my death and until such Home Corporation shall be so duly incorporated and entitled to receive such residuary estate and property, I give and bequeath absolutely unto my friends Eugene Higgins, Rodman Wanamaker and James Stillman and to such of them as shall survive." Undoubtedly for this reason the executors are given power of sale (R., 13), to sell convey, transfer, mortgage, etc., the real or personal property for the payment of annuities. It is found as a fact (R., 13) that the accounts show that all of the annuities here involved were, prior to November 14, 1920, paid out of the *corpus* of the estate. The reasoning in the Government brief is designed to support the proposition that to the extent any of these annuities were in fact paid out of *corpus* the annuitants did not realize taxable income but to the extent that they were paid out of income of the estate they would be so taxable. This is well illustrated by the *Appeal of Isaac Bell*, now pending be-

for the Board of Tax Appeals, wherein for the year 1922 his annuity of \$30,000 was paid partly out of income and partly out of *corpus* and the tax was asserted against him on account of the annuity only to the extent that it was paid out of income.

The testator himself obviously contemplated charging his entire estate with the bequests of annuities, for in his will he authorized and empowered the executors to sell, convey and encumber any and all property "for the purpose of paying any legacy or legacies or satisfying or providing for the payment of any * * * annuity or annuities" (R., 13). He likewise recognized that the charge of the annuities constituted a lien upon the assets in his estate and to complete the power of sale he directed "any and all property so sold, conveyed, assigned, mortgaged, leased or exchanged shall be free from any lien or charge by reason of any devise, bequest or annuity."

Consistent with the will and the settled law of the State of New York, the executors, in December, 1920, permanently set aside all of the estate left in their hands for the benefit of the Home Corporation subject only to the payment of annuities and other charges.

From the foregoing it follows that the annuity to Henrietta D'Aramon was property acquired by gift, or bequest; that she had no use or life estate in property with a mere right to income therefrom, but a claim against the entire estate secured by a lien thereon; that her property was readily capable of valuation; and that the value thereof, under Section 213(b), is excluded from income subject to taxation.

It is to be observed that we do not contend that a so-called annuity payable only from the income of property placed in trust is not subject to taxation

as income in the hands of the recipient. In such a case, the annuitant is the possessor of a use or life estate in the property placed in trust for the purpose of producing income with which to pay the annuity. The property received is the use or life estate from which there flows income and the taxation of the income is not taxation of the value of the property received. As will be pointed out hereinafter, this is the principal distinction between the instant case and the cases of *Irwin v. Gavit*, *supra*, and *Heiner v. Beatty*, *supra*, relied upon by the Government.

There remains to point out that the conclusion reached above, through the application of Section 213 (b) to the settled law regarding annuities in New York, not only avoids results not contemplated by the statute, but also meets every intendment of the statute. Taxing the annuity as income would result in imposing the income tax upon property which has already been subjected to the estate tax. For the purposes of the income tax, an annuity acquired by gift or bequest is indistinguishable in principle from a purchased annuity. Failure to tax this annuity does not result in escape from taxation of income otherwise taxable.

1.

To tax the annuity would result in double taxation not intended by the statute.

James Gordon Bennett died in 1918 and there was imposed by Section 403 of the Revenue Act of 1918 an estate tax based upon the value of his net estate. The value of the net estate is the value of the entire estate less certain allowable expenses, a specific exemption and the value of bequests to char-

itable or other exempt organizations. Where, as in this case, the residuary legatee is a charitable organization, then the value of the net taxable estate must be and in fact is determined by ascertaining the value of all of the non-exempt bequests and devises. Where the testator provides for the payment of annuities as a charge upon his entire estate with the residuum to a charitable organization the value of the net taxable estate includes the value of the annuities as of the date of death. In the Treasury Regulations, Art. 15, Regulations 63, annuities are valued by mortality tables giving the expectancy of life and discounting the present worth of the annual payments over such expectancy at 4%. Appellee sought to show by offering in evidence the Commissioner's assessment letter to the estate how the estate tax was in fact imposed, but upon objection this evidence was excluded and an exception taken (R., 35). Regardless of what the record fails to show, under the statutes providing for a tax upon the net value of estates, such a tax was imposed. Notwithstanding this, however, the Government proposes to impose in addition an income tax upon the annual payments when they are received. This is double taxation and not to be imposed unless specifically provided by statute. It would indeed be an anomalous situation if the Federal Government, after imposing an estate or inheritance tax on the value of these annual payments as *corpus* passing at death, is permitted to impose also an income tax upon the theory that the payments are not *corpus* but are *income*. Yet, that is precisely what the Government proposes to do. Referring to a situation in all essential respects similar, which arose under the Revenue Act of 1918, the Supreme Court in *United States v. Supplee-Biddle Company, supra*, at page 195, said:

“The result of the construction put by the Government upon Sections 233, 230 and 213 would be to impose a double tax on the proceeds of the two policies in this case over and above \$40,000, i. e., an income tax and an estate tax. Such a duplication even in an exigent war tax measure *is to be avoided unless required by express words.*” (Italics ours.)

The Government seems to concede this general principle, as it reasons on page 12 of its brief, “that the statute intended to tax as income to the beneficiary all of the income of an estate to be distributed to such beneficiary as such, exempting only bequests of capital which have already been reached by the estate tax.” If, therefore, an annuity, as under the Bennett will, is not directed to be paid out of income but is made a charge upon and payable out of the estate as a whole and its value is part of the estate on which an estate tax is payable, it seems obvious that as and when such annuity is paid (no matter from what source) it does not constitute income in the hands of the annuitant on which an income tax can be assessed.

Appellee sought to show below that the estate tax was in fact based partly on the capitalized value of the annuities. In view of the present argument of the Government, the error of the Board in excluding the evidence offered (R., 35) was prejudicial to the appellee. Accordingly, if the Court should be of the opinion that the question of double taxation is important and dependent on how the estate tax was in fact imposed, then it should remand the case to the Board for re-hearing and admission of the rejected evidence.

2.

A gift or bequest of an annuity is indistinguishable for tax purposes from a purchased annuity which does not produce taxable income until the cost has been recovered.

As aforesaid, the value of an annuity as of the date of death of the testator is easily ascertainable by the use of mortality tables. The annuities bequeathed by the Bennett will are bequests of property or legacies and the value of any such property or legacy is the present worth at the date of death. This value under Section 213 is not to be taxed as income.

If a taxpayer purchases an annuity he does not realize income from the annuity payments until the cost is recovered. *Allen v. Brandies*, 29 Fed. (2nd) 363; *Warner v. Walsh*, 27 Fed. (2nd) 952; *United States v. Bolster*, 26 Fed. (2nd) 760. Inasmuch as a gift or bequest of a sum of money does not result in taxable income, it follows that where a sum of money is given for the purpose of purchasing an annuity then the beneficiary has received a gift measured by the sum of money in question and does not realize any income from the annuity payments until the amount of the gift has been recovered. Indistinguishable in principle would be the case where a testator directed that a sum of money be used by his executor to purchase an annuity for a beneficiary. The value of the property bequeathed in this instance would be the purchase price of the annuity. And it logically follows that where a testator merely gives an annuity, without creating an interest or estate in a *corpus* from the income of which the annuity must be paid, then the value of the property received by gift or bequest is that sum

which would be required to purchase the annuity. In other words, the present value at the date of death. And such value must be recovered through the annuity payments before taxable income is realized, otherwise Section 213 (b) (3) is nullified.

3.

Exclusion of the annuity from taxable income, until its value has been recovered, does not result in the escape from taxation of income otherwise taxable.

In the Government's brief it is urged that the income of an estate being taxable income, then when paid in satisfaction of an annuity it must be taxed to the distributee, otherwise it will escape taxation. This is not correct. In the *Bolster* case, *supra*, the same argument was advanced by the Government, but the Court of Appeals, after referring to the opinion in *Irwin v. Gavit*, *supra*, wherein Mr. Justice Holmes called attention to the fact that if the income was not taxed to Gavit then it would escape taxation entirely, said:

"In the instant case we do not have to consider the possibility of the Government losing its original tax upon the income which Congress intended should be taxed. It is not a question of the statute 'failing to hit' something which ought to be taxed. Under the statute with which we are dealing a trust is the subject of taxation just as an individual. We think the Government must look to the trustee for its tax, and that the trust would clearly be taxable upon this income, if it were not expressly exempted because of its charitable character."

The Government reasons as follows: Section 219 taxes the income of estates and trusts, but any such

income "*distributable * * ** to beneficiaries" pursuant to the will may be deducted from the income of the estate, in which event it must be taxed to the beneficiaries. Annuities are *payable* out of income if there is sufficient income available. Therefore, *payments* to an annuitant constitute *distribution* of the estate's income pursuant to the will which may be deducted by it and therefore must be taxed to the annuitant. This assumes too much, because, as we have set out in the preliminary considerations, the source of a payment has nothing to do with its taxable character in the hands of the payee. Unquestionably, Section 219 intended that all income of an estate is subject to taxation, either in the hands of the estate or in the hands of the beneficiaries to whom it is distributable, unless otherwise exempted by the statute. But this does not mean that every payment made out of income to a beneficiary must be taxable income to the beneficiary, otherwise a bequest of a definite sum payable in one payment would be income to the legatee provided it was paid out of income of the estate. The annuities not being limited to the income of the estate, but being sums payable in any event constituting charges on the estate as a whole, are not distributions of income and therefore are neither taxable to the annuitants nor deductible by the estate. In other words, "it is not a question of a statute 'failing to hit' something which ought to be taxed."

While it is not essential to the instant case, it should be observed that the income from the securities permanently set aside for the Home is income of the Home which is not subject to taxation because it is an exempt organization. In other words, the income from the securities set apart for the Home will be excluded from taxation because of

other provisions of the law exempting charitable organizations and not for the reason that the annuitants are not subject to taxation on the annuity payments.

The position taken hereinbefore is submitted as the only one consistent with all of the provisions of the revenue acts. The value of a gift or bequest is not taxable. An annuity is a gift or bequest readily valued. Therefore, the annuity payments do not constitute income until the value of the gift has been recovered. (There is no suggestion that Henrietta D'Aramon in 1923 had recovered the present worth of this annuity computed as of 1918. She was a niece of the testator and therefore not beyond middle age and had an expectancy of many years more than the four years which had elapsed from the end of 1918 to the end of 1923.) The value of this annuity was required by the statute to be included in the estate subject to estate tax, and to tax the payments as income would result in double taxation based upon the theory that property can be *corpus* at one time and income at another. Failing to tax the annuity in the hands of Henrietta D'Aramon does not result in the escape of taxation because the income of the estate is taxable without deduction for the annuity payments, unless otherwise exempted. Purchased annuities are not taxable until the costs have been recovered, consequently annuities purchased with a gift would not be taxable. There is no difference in principle between a gift of a sum of money to buy an annuity and a gift of an annuity.

II.

The cases of *Irwin v. Gavit* and *Heiner v. Beatty* distinguished.

In the *Gavit* case the taxpayer was entitled to receive for life a part of the income from a fund placed in trust with remainder over. In the *Beatty* case the will provided for the payment of an "annuity" of \$5,000 a year for life, but it also provided that the executors should either purchase the "annuity" or set aside in trust a fund sufficient to pay \$5,000 a year from the income thereof to Beatty and thereafter to his wife if she should survive him. While the will provided for what the testator termed an "annuity" to Beatty, nevertheless, under the option given to the executors there was created only a life estate or interest in a fund from which income of \$5,000 a year flowed to Beatty. In both the *Beatty* and *Gavit* cases the Supreme Court held that income was received and that it was taxable. Neither of these decisions, however, is applicable in the instant case. The estate tax would not have applied to the funds received by Beatty and Gavit, because only the *corpus* from which the funds flowed had been taxed. Therefore, double taxation did not result. Since the funds received by Beatty and Gavit were distributions of income *as income* pursuant to the terms of the wills, the trusts were permitted to deduct the sums so distributed and failing to tax the recipients would have resulted in the escape from tax of income when the statute contemplated taxing all income not specifically exempted. Furthermore, in each of those cases, the property acquired by bequest was a use or life estate from

which income flowed, and no part of the property so acquired was taxed. Thus, provisions of the earlier Acts similar to Section 213 (b) did not apply. In the instant case, however, the entire value of the property received is sought to be taxed by the Government contrary to Section 213 (b).

III.

In any event the appellee, a non-resident alien, is not taxable upon the annuity even if it is held to be income.

Section 213 (c) of the Revenue Act of 1921 provides:

“In the case of a non-resident alien individual, gross income means only the gross income from sources within the United States, determined under the provisions of Section 217.”

Henrietta D'Aramon is a non-resident alien individual, therefore resort must be had to Section 217 to ascertain what income from sources within the United States may be included in her gross income subject to tax. Section 217 is as follows:

“Section 217 (a) That in the case of a non-resident alien individual * * *, the following items of gross income shall be treated as income from sources within the United States:

(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise * * *;

(2) The amount received as dividends

(A) from a domestic corporation other than * * * or

(B) from a foreign corporation unless
* * *;

(3) Compensation for labor or personal services performed in the United States;

(4) Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) Gains, profits, and income from the sale of real property located in the United States."

It is not to be presumed that a non-resident alien individual, a citizen and subject of another country, is subject to the income tax laws of the United States, and if those laws attempt to impose a tax it will not be presumed that the tax is imposed upon any other income than that specified. Section 217 specifically enumerates the classes of income to be returned for taxation by non-resident alien individuals. From what has been said above, it is quite apparent that even if the annuity in question is income then it is not interest, dividends from either domestic or foreign corporations, compensation for labor or services performed, rentals or royalties, or gains from the sale of real property within the United States. It may be true that the estate of James Gordon Bennett realized part of *its* income from one or more of the enumerated sources, but the source to the estate is not the source to the annuitant. For example, suppose that the estate had a large income from tax exempt Government bonds and it paid one annuitant out of this tax exempt interest and another annuitant out of other interest

or profits from the sale of real estate. It certainly could not be said that the annuitant who received the tax exempt interest may not be taxed and the one who received profits on real estate may be taxed. Money paid to annuitants cannot be thus earmarked for tax purposes. It is quite obvious that if an annuity is income, it is a species of income that can not be described by any other term than "annuity."

Therefore, since non-resident alien individuals are taxed only on the classes of income enumerated in Section 217, and since annuities are not enumerated, then irrespective of whether or not annuities are income generally the annuity in question cannot be taxed to Henrietta D'Aramon.

IV.

Fallacies in the Government's brief.

In the first place on page 2 the question is not correctly stated in that it includes the phrase "pursuant to the provisions of the testator's will." The annuity in question was not required by the will to be paid out of income of the estate. In fact, the will mentions the word "income" in only one instance, namely, where it provides that all of the income, until the Home should be incorporated, shall be paid to the testator's three friends. The annuity in question has not been paid out of income pursuant to any provisions of the will; but, as a definite obligation charged on the estate as a whole, it has been paid from time to time out of income or *corpus* as circumstances warranted. No time was provided in the will as to when the Home should be incorporated except that it shall be "as soon as

practicable after my death and during the lives of Isaac Bell and James Gordon Douglas and the life of the longest liver of them" (R., 11). It might therefore have been many years before the Home was formed and during which time all income from the residuary estate which accrued after death would have been paid to the three friends as provided in the will (R., 12).

Throughout the brief may be noted the controlling theory that a payment to a beneficiary from income must be income to the beneficiary. We have hereinbefore fully demonstrated that the source of the payment does not determine its character in the hands of the payee for tax purposes.

It is stated on page 11 that a construction other than that urged by the Government renders Section 219 nugatory and would grant absolute exemption to income of estates periodically distributed. This proposition is erroneous, for, as we have stated, when an estate pays to a beneficiary that which is not income to the beneficiary, then it is not a distribution of the estate's income which may be deducted under Section 219 (a) (4). *United States v. Bolster, supra.*

The Government concludes on page 12 that the statute was intended to tax as income to the beneficiary all of the income of an estate distributed *as such*, exempting only bequests of capital not already reached by the estate tax. We have pointed out that this was not a distribution of the income *as such* and that the value of this annuity was reached by the estate tax. In passing it might be observed that the Revenue Act of 1921 continued the estate tax. It comes with poor grace from the Government after successfully objecting to evidence of the imposition of the estate tax on this annuity, to argue that it escaped the estate tax.

In Point II, page 13, the Government's brief is devoted to arguing that the Gavit and Beatty decisions are controlling. We have already pointed out that in those cases there was no double taxation; that failure to tax in those cases would have resulted in the escape of all income from a tax; and that in those cases none of the value of the property acquired was taxed, whereas the contrary is true in the instant case.

The rule of strict construction against an exemption is invoked on page 20, thus ignoring *United States v. Merriam*, *supra*, the only decision on the question.

On page 18 is a statement that it is conceded that annuities are paid primarily out of income, and the case of *Cummings v. Cummings*, 146 Mass. 501, is cited. No such concession is made. In the *Cummings* case, those charged with the payment of the annuity had "in their hands a fund producing income sufficient to pay it". The Government has persistently ignored and misunderstood the facts in the instant case. The executors, in accordance with the intention of the testator and the law of the State of New York, permanently set aside in 1920 all of the assets in its hands for the benefit of the Home Corporation subject to the charge of the annuities. This is not, as the Government seems to believe, a case of the executors holding in trust all of the remainder of the estate for the purpose of producing income with which to pay the annuitants; but, on the contrary, the executors had no right to withhold the remainder from the Home. The Home had, both under the will and the law of New York, the right to the remainder subject to the charge of the annuities and this charge was satisfied by a lien on so much of the capital value as equalled the

present worth of the annuities. Neither the will nor the law permitted holding in trust a fund sufficient to produce income with which to pay the annuities.

Throughout the brief, and particularly on page 20, the expression "gift of income" is used. This expression has no settled judicial meaning and serves no purpose from the tax standpoint. The only use of the phrase "gift of income" that can be found in the authorities is in those cases where there is a gift of the use of property, such as a life or terminable interest, from which income flows. In such cases there is always a fund or corpus or other property in which the beneficiary is given a use with remainder over, and thus the beneficiary derives income from the fund or corpus or other property but does not thereby exhaust the fund or corpus or other property. This is sometimes called "a gift of income" and the expression does not appear to have any broader legal significance.

We reiterate that the appellee received merely an annuity which was a charge on the entire estate payable in any event and not confined to the income from any property. She did not receive a use of property, or a life or terminable estate or interest in any property; but she received an absolute right to a sum certain each year which constituted property to her, the value of which was readily ascertainable and is specifically excluded from taxable income by Section 213 (b) of the 1921 Act.

CONCLUSION.

In accordance with the foregoing the appellee submits that this Honorable Court should affirm the decision of the Board of Tax Appeals.

Respectfully submitted,

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New York, N. Y.,
April 12, 1929.

COURT OF APPEALS
DISTRICT OF COLUMBIA
~~FILED~~

APR 15 1929

Henry W. Hodges
clerk.
United States Court of Appeals

DISTRICT OF COLUMBIA.

DAVID H. BLAIR, Commissioner of Internal
Revenue,

Appellant,

against

RONALD DE REUTER,

Appellee.

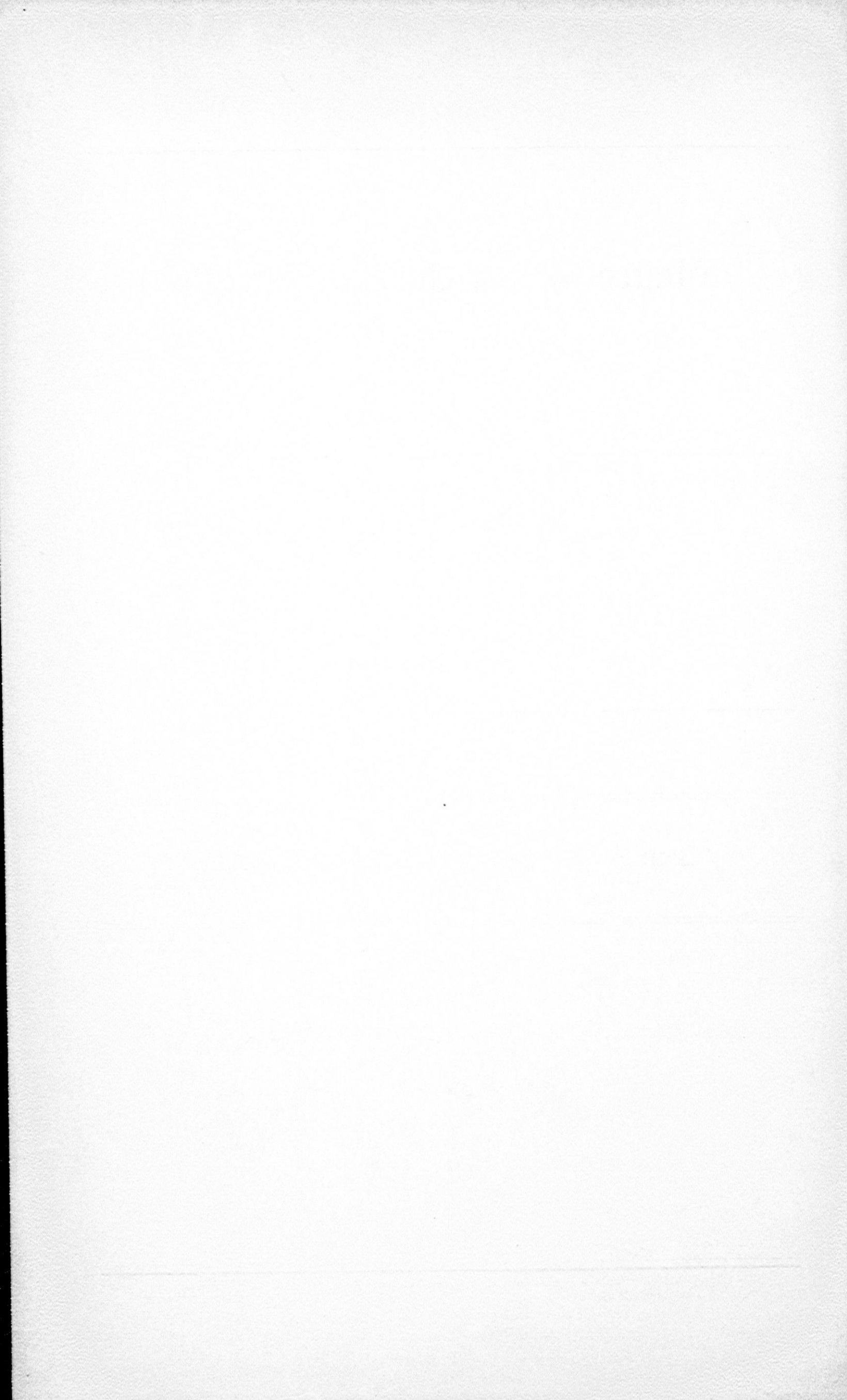
No. 4848.

BRIEF ON BEHALF OF APPELLEE.

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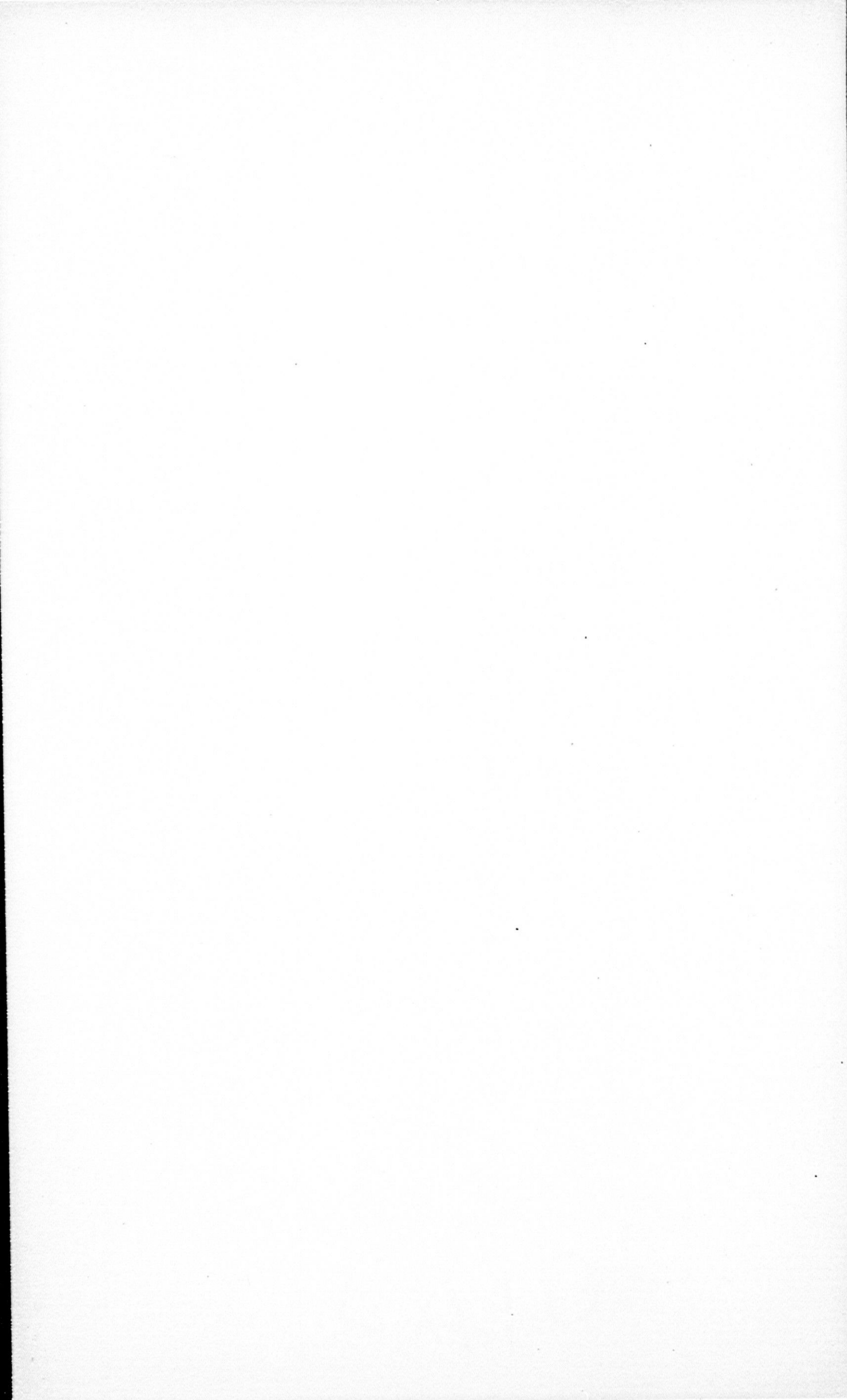
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United States Court of Appeals

DISTRICT OF COLUMBIA.

DAVID H. BLAIR, Commissioner of
Internal Revenue,
Appellant,

against

RONALD DE REUTER,
Appellee.

No. 4848.

BRIEF ON BEHALF OF APPELLEE.

Statement of Case.

This is an appeal by the Commissioner of Internal Revenue from an order of redetermination of the United States Board of Tax Appeals, entered October 13, 1927, in which it was adjudged that taxpayer was not liable for any income tax deficiency for the year 1923 (Rec., pp. 19-20). The petition for review was filed on April 7, 1928 (Rec., pp. 20-24), pursuant to the provisions of Sections 1001 (a) and 1003 of the Revenue Act of 1926.

Throughout this brief we shall refer to the Appellee, Ronald de Reuter, as the taxpayer.

This appeal presents the question of the taxability as income of the annuity given and bequeathed to taxpayer by the last will and testament of James Gordon Bennett.

Statement of Facts.

The taxpayer is a non-resident alien, being a citizen of France, residing in France (Rec., p. 8).

James Gordon Bennett, a citizen of the United States of America, died on or about the 14th day of May, 1918, leaving a Last Will and Testament by which he provided in part as follows:

“Eighth: I give and bequeath to my stepson Ronald de Reuter an annuity of Twenty thousand dollars to be paid to him in equal semi-annual payments in each year during his life, reckoning the years from the time of my death.” (Rec., pp. 8, 9).

By the 29th clause of said Last Will the decedent directed the incorporation by his executors of a corporation to be named “The James Gordon Bennett Memorial Home for New York Journalists,” the general object of which was to provide and maintain a suitable and comfortable home or to provide pecuniary aid for persons who had been employed for at least ten years on newspapers or journals published in the Borough of Manhattan, City of New York, and who shall be unable to care for themselves. To such corporation *when formed* he gave the entire residue of his estate. Pending its formation all the income of the residuary estate was given to testator’s three friends, whom he named executors (Rec., pp. 9-10).

By the Thirtieth Clause of said Will, the testator further provided as follows:

“* * * For the purpose of paying any legacy or legacies, or satisfying or providing for the payment of any of my debts or obligations or of any annuity or annuities or for the execution of this my Will or for the administration of my estate or for

any other purpose, I authorize and empower the Executors or Executor for the time being of this my Will, in their or his uncontrolled discretion, to sell, assign, convey, transfer, mortgage, lease or exchange any real or personal property which may belong to me at my death or which may at any time belong to or form part of my estate and property, and to execute and deliver any and all deeds, conveyances, assignments, mortgages, leases and other instruments which may be necessary or proper to carry any such sale, assignment, mortgage, lease, exchange or other disposition into effect, and any and all property so sold, conveyed, assigned, mortgaged, leased or exchanged shall be free from all lien or charge of or by reason of any devise, bequest or annuity given or made by this my Will or any Codicil thereto. I authorize and empower said Executors or Executor to retain and hold any personal property which may belong to me at the time of my death and *to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me*" (Rec., pp. 11, 12).

The James Gordon Bennett Memorial Home for New York Journalists Corporation was duly incorporated in May, 1919, as a charitable corporation under the laws of the State of New York with the approval of a Justice of the Supreme Court of the State of New York and the New York State Board of Charities, as required by statute, and such corporation is still in existence (Rec., pp. 25, 26).

In the year 1924, the executors under the Will of James Gordon Bennett filed a non-resident Income Tax Return on Form 1040 (b) for Ronald de Reuter in which they set forth that they had paid to him in the year 1923 the sum of \$20,000 on account of his annuity under the Eighth Clause of the Will and stated that they were advised by counsel that said annuity was a legacy and not income taxable to Ronald de Reuter (Rec., p. 4).

The Will of James Gordon Bennett did not appoint any trustees. The executors under the Will have not set apart any portion of the residuary estate or constituted any separate trust or trust fund to produce or provide the sum of Twenty thousand Dollars to pay the annuity to the Taxpayer under the Eighth Clause of the Will (Rec., p. 30).

The assets of the Estate of James Gordon Bennett have been permanently set aside by the executors to the James Gordon Bennett Memorial Home for New York Journalists Corporation, the residuary legatee under the Will, subject to taxes, annuities and other charges. This action by the executors was reported in their accounting to the Surrogates' Court of New York County and such action was approved by said Surrogates' Court (Rec., p. 12).

The Commissioner determined that the sum of \$20,000 received by Taxpayer during the year 1923, pursuant to the Eighth Clause of the Will was taxable as income, pursuant to Article 345, Regulations 62 (Rec., p. 6).

From this determination taxpayer appealed to the United States Board of Tax Appeals, putting forward the contention that the annuity in question was property acquired by gift or bequest within the provisions of Section 213 (b) (3) of the Revenue Act of 1921, and as such was specifically excluded from taxpayers' gross income for purposes of income tax (Petition; Rec., pp. 3-5).

This contention was upheld by the Board in its able opinion, reported in 7 B. T. A. 600 (Rec., pp. 12-19).

POINTS.

I.—The sum of \$20,000 paid to Taxpayer in 1923 is property acquired by gift or bequest within the provision of Section 213 (b) (3) of the Revenue Act of 1921, and as such cannot be included as part of the gross income of the Taxpayer for purposes of Income Tax.

II.—The bequest under the Eighth Clause of the Will is not a gift of income nor is the sum paid to the Taxpayer by the Executors *income* from any source or accruing upon any securities or property.

III.—The gift or bequest in the Eighth Clause of the Will does not constitute a trust, the income of which is to be distributed periodically, and it is not taxable under Section 219 of the Revenue Act of 1921 nor Article 345 of Regulations 62.

IV.—If the annuity to taxpayer is not excluded from taxation as property acquired by gift or bequest, then it still cannot be taxed as income unless it comes within one of the classifications of Section 217 (a), taxpayer being a non-resident alien.

General Argument.

It may not be amiss to state some of the fundamental principles which must govern a determination of the question presented before arriving at a discussion and application of the particular provisions of the Statute.

In the first place, it should be pointed out with emphasis that the **Congress cannot tax as income that which is not in fact income.** The Constitutional Amendment provides:

“The Congress shall have power to levy and collect taxes on income from whatever source derived without apportionment among the several states,” etc.

All statutes and regulations in furtherance of the amendment are subordinate to the amendment, and cannot exceed the authority of the amendment in taxing *income*. To the extent that any Revenue Act exceeds the Constitutional Amendment, it is unconstitutional.

Eisner v. Macomber, 252 U. S. 189;
Kerbaugh Company v. Bowers, 300 Fed. 938;
 affirmed 271 U. S. 170;
Pitney v. Duffy, 291 Fed. 621; affirmed 2 Fed.
 (2nd) 230;
Appeal of Kling, 1 Board of Tax Appeals
 1041.

“Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution from which alone it derives the power to legislate and within whose limitations alone that power can be lawfully exercised.”

Eisner v. Macomber, *supra*.

Perhaps the most striking illustration of this principle is afforded by the attempt to tax stock dividends as income. The Supreme Court of the United States decided in *Towne v. Eisner*, (245 U. S. 418) that a tax upon stock dividends as income was unauthorized under the Revenue Act of 1913. Thereupon, into the 1916 Revenue Act Congress wrote a specific provision making the Income Tax applicable to stock dividends. The Supreme Court of the United States in *Eisner v. Macomber* promptly held that a stock dividend was not income

within the meaning of the Sixteenth Amendment to the Constitution and could not be taxed as such, saying,

“It is manifest that the stock dividend in question cannot be reached by the Income Tax Act and could not, even though Congress expressly declare it to be taxable as income, unless it is in fact income.”

We have a further illustration of this principle in the attempt to tax as income to the owner of a corporate bond the two percent tax paid by the debtor corporation to the Government. The Treasury Department in Regulations 45, Art. 31 ruled that the two percent tax paid by the debtor corporation was additional income to the holder of the bond. In passing upon this contention, the Court said:

“Obviously this is a pure fiction for that which the bondholder never received cannot be regarded as falling within the definition of income as contained in either of the acts in question.” (1917-1918.)

Pitney v. Duffy, supra.

As a corollary to this fundamental principle, it has been frequently announced as an established rule that any doubt or ambiguity in a taxing statute must be construed in favor of the taxpayer and strongly against the Government. The statute must not be extended by loose construction or by inference or implication beyond the clear import of its language and the burden of proving that the subject matter in question comes within the taxing statute is upon the Government.

Gould v. Gould, 245 U. S. 151;
Plant v. Walsh, 280 Fed. 722.

It is well established, however, that where an exemption from taxation is claimed under the Taxing Statute, the burden is upon the taxpayer to prove that he is entitled to the exemption.

Douglas v. Edwards, 298 Fed. 238 and cases cited.

Under the Revenue Act of 1913, Section 2-B (1) it was provided that "gross income" for the purpose of taxation should include the income from, but not the value of property acquired by gift, bequest or devise. Interpreting that Section, the Supreme Court of the United States held that they were words of exception and not of exemption.

U. S. v. Merriman, 282 Fed. 851; affirmed 263 U. S. 179.

The 1916 and subsequent Revenue Acts contain the provision that "gross income" does not include the value of property acquired by gift, bequest, devise or descent, "which shall be exempt from taxation."

Section 213 (b) (3).

There can be no doubt these are still words of exception and not of exemption. Property acquired by gift or bequest is still to be excluded from gross income under the 1916 and subsequent Acts exactly the same as it was excluded under the 1913 Act and the addition of the phrase that they shall be "exempt from taxation" has added nothing whatever to their status.

U. S. v. Supplee-Biddle Company, 265 U. S. 189 on page 194.

"In other words, it must first specifically appear that the property is taxed, and if, after that specific provision, an exemption from taxation is

claimed, such right to exemption must affirmatively appear from the taxing statute.”

U. S. vs. Carroll Chain Co., 8 Fed. (2) 529.

Therefore, when a taxpayer claims that he was the recipient of a gift or bequest, he is not claiming an exemption from taxation so as to be charged with the burden of proof incident thereto, but the burden of proving that the particular payment must be included within the gross income of the taxpayer so as to be taxable under the statute is still upon the Government, under the authorities above cited. The Commissioner's argument to the contrary on page 20 of his brief is clearly against the authorities.

What, then, constitutes income which is taxable under the Revenue Act of 1921 in the light of the Constitutional Amendment?

The Act itself defines income as follows:

“Section 213. That for the purpose of this title the term gross income—

(a) Includes gains, profits and income derived from salaries, wages or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever, * * * but

(b) Does not include the following items which shall be exempt from taxation under this title:
* * *

(3) The value of property acquired by gift, bequest, devise or descent, but the income from

such property shall be included in gross income;
* * *

Sec. 213 (c) In the case of a non-resident alien individual, gross income means only the gross income from sources within the United States, determined under the provisions of section 217."

We wish to call particular attention to the fact that under the Revenue Act, the gross income of a non-resident alien is defined in a separate and distinct section. It is true that Section 213 above quoted defines gross income, but it refers us to Section 217 which discloses that a special test is applicable to determine the gross income of a non-resident alien. Since Ronald de Reuter was and still is a non-resident alien it is obvious that a reference to Section 217 becomes absolutely necessary. That section provides as follows:

"Section 217 (a) That in the case of a non-resident alien individual * * *, the following items of gross income shall be treated as income from sources within the United States:

(1) Interest on bonds, notes, or other interest-bearing obligations of residents, corporate or otherwise * * *;

(2) The amount received as dividends

(A) from a domestic corporation other than
* * * or

(B) from a foreign corporation unless
* * *;

(3) Compensation for labor or personal services performed in the United States;

(4) Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United

States, patents, copyrights, secret processes and formulas, good will, trade-marks, trade brands, franchises, and other like property; and

(5) Gains, profits, and income from the sale of real property located in the United States.”

Income within the meaning of the amendment and any Income Tax Act must be taken in the common understanding of the term.

Eisner v. Macomber, supra.

The Supreme Court of the United States has defined the word income as used in the Constitutional Amendment and in the Statute in the following language:

“Income may be defined as the gain derived from capital, from labor or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets * * *. ‘Derived-from-capital’; ‘the gain-derived-from-capital’, etc. Here we have the essential matter; *not* a gain accruing to capital, *not* a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in* being derived, that is *received* or *drawn by* the recipient (the taxpayer) for his *separate* use benefit and disposal;—*that* is income derived from property. Nothing else answers the description.”

Eisner v. Macomber, supra.

The foregoing definition has been quoted approvingly in numberless decisions and has been adopted by various courts as being the true meaning of the word “income” for purposes of taxation.

We shall have occasion to consider this definition in the course of our argument, but for the present we shall

pass on to our main contention which does not fundamentally involve an application of that definition to the taxpayer's situation since it is contended that the money received by the taxpayer in the present case was a gift or bequest and as such specifically excluded from the taxpayer's income for the purposes of taxation.

POINT I.

Under Sec. 213 of the Revenue Act of 1921, it is specifically provided what shall be included in "gross income" as we have heretofore quoted, but *there shall not* be included in "gross income."

'The value of property acquired by gift, bequest, devise or descent, but the income from such property shall be included in gross income.'

Section 213 (b) (3).

We take it as beyond question that this provision regarding gifts, bequests, etc., applies equally to citizens and non-resident aliens. It seems obvious that under Sec. 213 (b) (3) the value of property acquired by gift, bequest, &c., shall not be included as part of the gross income of any individual, whether citizen or alien, resident or non-resident. Consequently if it be established that the annuity in the instant case is properly acquired by gift or bequest, it will follow that it cannot be subjected to income tax. The alien character and the non-residence of the taxpayer cannot affect a determination of that question and a resort to Section 217 does not become necessary unless it be determined that the annuity in the instant case does not come within the excluding provision of Sec. 213 (b) (3), in which event it is still not subject to income tax unless it falls within one

of the five classes of income from sources within the United States, as determined by Section 217.

Our primary inquiry, therefore, is whether the annuity paid to taxpayer is property acquired by gift or bequest.

A bequest is a gift by will of personal property.

U. S. v. Merriman, 263 U. S. 179; 40 Cyc. 994, and cases cited.

In common acceptation a bequest and a legacy are synonymous terms, but "bequeath" is the term generally by which a gift of personalty is made by Will and a "legacy" is the money or personal property bequeathed.

Page on Wills, Section 2; *Campbell's Estate*, 75 Pacific 851.

The word "gift" is a word of considerable scope embracing all voluntary transfers of property without consideration.

Schouler on Wills, 6th Ed. Vol. 1, Sections 3 to 5.

It may be interesting to note that as far back as 1868 the Treasury Department ruled that gifts are not considered as income for the purpose of taxation. In construing the Revenue Act of 1867, the Commissioner of Internal Revenue wrote:

"Gifts of money when clearly not in the nature of payment for services rendered or other valuable consideration are not liable to taxation as income."

7 Internal Revenue Record 59, Washington, Feb. 18, 1868.

Again, we find in Boutwell, Direct and Excise Tax System of the United States, 1863, page 275, the following:

“Legatees are not required to return their legacies as income.”

And in 1888 Lord Chief Justice Coleridge wrote the following with regard to gifts under the British Income Tax Acts of 1842 and 1853:

“Now is this sum in the hands of the curate assessable to the Income Tax? It is, if it is an ‘annual profit or gain arising from any kind of property or from any profession, trade, employment or vocation’; but it clearly does not so arise; it comes at the mere will of the charitable society.”

Turner v. Cuxon, 1888 Law Reports, 22 Q. B. D. 150.

It was, therefore, a principal firmly intrenched in the law long prior to the Sixteenth Amendment that the word “income” excluded property acquired by gift or bequest and in enacting the amendment it must be assumed that Congress adopted that construction.

“We must assume that Congress had in mind by using the term ‘bequest’ in the Income Tax Law, to give to it that settled rule of construction well known and sanctioned by judicial decision.”

Merriman v. United States, 282 Fed. 851 at page 855, affirmed 263 U. S. 179.

Congress subsequently confirmed this interpretation by enacting in the Income Tax Law a provision which excluded from taxable income the value of property acquired by gift or bequest.

The Eighth Clause of the Will of James Gordon Bennett gives and bequeathes to his stepson, the Tax-

payer, an *annuity* of Twenty thousand Dollars to be paid to him in equal semi-annual payments in each year during his life.

This is obviously a gift or bequest. The testator uses the very words of "give" and "bequeath." It obviously is a voluntary transfer of personal property without consideration passing under a will. It satisfies all the requirements of a gift or bequest according to the judicial definition of those words, and the amount thereof must be excluded from the gross income of the Taxpayer in accordance with the clear and unambiguous direction of the Statute—unless the word "annuity" attached to the gift changes its character so as to take it out of the language of the Statute and deprive it of the exclusion from gross income granted thereby.

An "annuity" is defined as a fixed sum granted or bequeathed, payable periodically but not necessarily annually, subject to such specific limitations as to duration as the grantor may lawfully impose. It is a stated sum payable annually or a yearly payment of a certain sum of money granted to another in fee for life or for years.

Peck v. Kinney, 143 Fed. 76;

Matter of Collins, 144 N. Y. Reports, 522;

Booth v. Ammerman, 4 Bradford (N. Y.), 129.

An annuity granted by Will is a legacy or a bequest.

"A man may purchase an annuity which is not a legacy, yet where an annuity springs alone from a Will and is given by it, it is a legacy."

Heatherington v. Lewenberg, 61 Mississippi 372; see to the same effect *Reid v. Brown*, 54 N. Y. Misc. Report 481; 3 *Corpus Juris*, 202; *Budd v. Budd*, 59 Fed. 735.

An annuity is a legacy and when payable out of rents it is a charge on the land.

Smith v. Farmer Type Company, 16 N. Y. App. Div. 438; *Matter of Toms*, 84 N. Y. Misc. 312; *Clark v. Clark*, 147 N. Y. 639; *Canal Bank v. Hudson*, 111 U. S. 66.

There can be no question that the sum of money given to the taxpayer under the Eighth Clause of the Will was a gift or bequest, *viz.*, a voluntary transfer of property without consideration passing under a will. If the testator had bequeathed the sum of \$20,000 to the taxpayer, there can be no question whatever that it would be exempt from taxation under Section 213 (b) (3). Its character as a bequest would not in any manner be altered by the fact that the beneficiary thereof might be compelled to wait one, two or three years before receiving it, or for convenience of administration might receive it in instalments over a period of years. What is essentially a gift or a bequest does not cease to possess that character simply because it is payable over a period of years. It still remains a gift or bequest of a principal sum and is not in any sense a gift of income to the taxpayer.

At this point we desire to discuss an ingenious distinction which it has been attempted to introduce into the meaning of the word "bequest" by argument of Government attorneys in several of the cases which we shall consider later on in our brief. Although the argument has not been made in the commissioner's brief on this appeal, it has in fact been advanced in support of one of the assessments made against an annuitant under the Will of James Gordon Bennett who is in exactly the same status as Ronald de Reuter. Consequently we feel justified in referring to the argument even though an entirely

different theory of taxation has been advanced against our taxpayer. Such reference will in our opinion serve to bring out the fundamental legal conception of an annuity.

The Revenue Acts exclude from gross income the value of, but not the income from property acquired by gift, bequest, devise or descent. The plain and obvious meaning of that language is that if "A" makes a gift of \$20,000 to "B" that sum is not taxable as income to "B" for the reason that it comes to "B" as a capital sum which should or may, after its receipt, begin to earn interest or produce income for "B". The same applies to a bequest under a Will. When that fund in "B's" hands produces income, that income is taxable to him. That is exactly what the statute plainly says and it is in conformity with law and common sense.

Now it has been suggested that if "A" bequeaths in his Will a sum of \$20,000 to "B" what "B" receives as a bequest is merely the "*right*" to have that sum paid to him from the Estate of "A" and that such "*right*" is a *bequest* which is to be excluded from the gross income of "B". Proceeding with this distinction, it is urged that this "*right*" to receive the money is the capital of "B" which is exempt, but that when the sum of \$20,000 is actually paid to him, it flows from or is derived from that hypothetical capital asset—hence, it is a gain derived from capital and as such taxable to "B".

It ought to be sufficient to point out that Congress did not exclude from gross income the "*right*" to a bequest. If it had been intended to do so they might have found appropriate language so that the utter worthlessness of the exemption might be apparent on its face.

This attempted distinction presupposes that Congress did not use the words "gift" or "bequest" in their ordinary or accepted meaning for nowhere in the law do we

find any such definition or construction of the words suggested. No authorities could be cited for such a distinction. To endeavor at this date to introduce such a metaphysical distinction into the words is to do violence to a cardinal principle of statutory construction.

United States v. Merriman, supra;
Kepner v. United States, 195 U. S. 100.

If the testator had bequeathed his gold watch to Ronald de Reuter, it must logically follow that his *right* to the watch was a bequest exempt from tax, but that the value of the watch when received was income to him flowing from or derived from such right and consequently subject to income tax. Could any interpretation of the statute be more ludicrous?

If the "right" to a bequest is exempt from taxation then must also the "right" to a gift be exempt—and there is no such thing as a "right" to a gift. By the same token Congress must have intended to exempt from Income Tax the right of an heir, for example, to take an estate of \$1,000,000 and to subject to income tax the million dollars when received—at the same time imposing an Estate Tax upon the theory that it was the transfer of a corpus. And again, a laborer has a right to be paid for work performed—yet we never heard of his being taxed on the theory that his compensation was income from his "right" to be paid rather than income from his labor.

It is impossible to see how such a conception of a right to a bequest as distinguished from the bequest itself has any foundation in law or in logic.

Even conceding that the "right" to receive a bequest in the property or the capital which the taxpayer received, we are still confronted with the plain wording of the Act which says that the *value* of the property acquired by bequest is exempt from taxation. We ask, therefore,

what is the value of that property which is exempt from taxation unless it be the sum paid in satisfaction of that right?

If a gift or bequest is exempt from income tax only to the extent of the so-called "right" created thereby, but taxable as soon as payment is received, we search in vain for any logical reason for the promulgation by the Treasury Department of Article 73, Regulations 62, which says:

"Money and real or personal property *received* as gifts or *received* under a Will or under statutes of descent and distribution are exempt from tax.
* * * Neither alimony nor an allowance based on a separation agreement is taxable income."

Alimony or a separation allowance under an agreement flow just as freely from a "right" as does a bequest. Why the distinction between the two? We have above a Treasury regulation declaring in no unmistakable terms that "money received" under a will is the thing which is exempt from taxation.

It is a fundamental principle that if an heir or legatee dies before the estate has been distributed—before this "right" has been reduced to possession—the personal representatives of the heir or legatee succeed to the share.

14 *Cyc.* 109.

When the personal representatives receive the Estate or the legacy, we wonder whether it would be taxable to them under the Estate Tax provisions or under the Income Tax provisions, as being income derived from a "right" or a series of rights?

We note with interest the publication of General Counsel Memorandum No. 674. The question there dealt with related to the following facts:

The testator who died in 1917 appointed his widow executrix and sole beneficiary of his Estate. The order for distribution of the Estate was not entered in Court until 1923. Shortly thereafter the widow made some gifts of the property she had acquired from the Estate and she claimed that they were not subject to the gift Tax under the 1924 Act because the property could be identified as having been received by her within five years prior to the gift. If the widow had *received* the property by reason of her husband's death in 1917 the gift tax was properly assessed. If she had not received the property until the order of distribution was made in 1923, then a gift thereafter in 1924 was not taxable under Section 321 (a) (4) of the Gift Tax Act.

The opinion of the General Counsel was that the widow received the property in 1917 by reason of her husband's death and that when the distribution of the Estate was made in 1923, it related back to the date of death. Numerous authorities are cited for the proposition that the widow received the Estate in theory of law at the time she became entitled to it, even though distribution was postponed.

We submit that a bequest is received at the moment the beneficiary becomes entitled to receive it and that the foregoing opinion emphasizes the fact that the "right" and the bequest are one and the same thing, inseparable and indivisible for tax purposes.

POINT II.

This brings us to the second point in our argument namely, to emphasize the distinction between a gift of an annuity and a gift of income from a particular fund.

There is a distinction between income and an annuity. The former embraces only the net profits after deducting

all necessary expenses and charges. The latter is a fixed amount directed to be paid over and above and without contingency. The income of a certain fund is not an annuity but simply profits to be earned and although directed to be paid annually, that relates only to the mode of payment and does not change the character of the bequest.

Poe v. Raleigh Airline Company, 54 South Eastern 406;

Peck v. Kinney, 143 Fed. 76.

A simple gift of interest upon a specified principal sum, although directed to be paid annually is not an annuity, but merely a gift of income.

In re Dewey, 153 N. Y. Rep. 63 (where the testator directed that his widow should be paid annually "the interest upon the sum of \$12,000").

The Will of James Gordon Bennett does not bequeath income from any fund to the taxpayer. The testator does not direct the investment of any portion of his estate to produce income to meet the annual payment. No income is received by the executors which is specifically applicable to the payment of the annuity to Ronald de Reuter.

Where a gift of an annuity is not charged against income by the instrument creating it, resort may be had to the corpus if the income is insufficient.

Comstock v. Herron, 55 Fed. 803; *Cooper's Estate*, 23 Atlantic 456; *Matter of Kohler*, 193 New York App. Div. 8.

In *Matter of Kohler* (193 New York App. Div. at page 21), the Court wrote:

"In * * * *Spencer v. Spencer*, 38 App. Div. 403, the will provided explicitly that the executors should set apart a certain portion of the testator's

real estate, in their judgment sufficient to yield a net income of \$25,000 per annum, and *out of the income* pay \$25,000 per annum to the widow for life. The italicized words show that this was a trust to pay out of income, and not an annuity, which distinguishes it from the instant case.”

The Will of James Gordon Bennett authorized his executors to “set aside and hold any part” of his personal estate to provide for the payment of any annuity (Paragraph 30).

This provision did not in any manner alter, modify, enlarge or restrict the outright bequest of \$20,000 as an annuity under the Eighth Clause of the Will. The testator does not authorize his executors to set aside any part of his estate for the purpose of providing an *income* sufficient to pay the annuity. In the very same paragraph he empowers his executors to sell, convey, mortgage, lease or exchange any of his property for the purpose of paying any annuity—all of which confirms the testator’s intention to make his entire residuary estate both principal and income, liable for the payment of annuities. Consequently the taxpayer is entitled to receive the sum of \$20,000 each year regardless of what the income of the residuary estate might be. The taxpayer is not interested in the income of the estate; he is not entitled to receive any specified portion of the principal or of the income of the estate. If the fund in the hands of the executors produces sufficient income to pay the annuities, so much the better for the residuary legatee—so much the less will the residuary estate be depleted. Whatever income is derived from the securities and the investments in the hands of the executors *is income to the Estate only and is subject to taxation or not, according to the statute and regulations which define the taxability of estates as such.* When the executors pay over

the annuity to the taxpayer, they may utilize funds which in their hands were entirely principal or entirely income or a mixture of both. When it is received by the annuitant, it is not in any sense impressed with the same form, character or distinguishing marks which it had in the hands of the executors. Its character and quality when received by the taxpayer is determined solely by the instrument under which it was paid to him, namely the Will.

The argument that it must be income to the annuitant because it was income to the Estate is devoid of any logic. If that be true, then the reverse must be true, namely, that what was income to the taxpayer must have been income to the Estate. To show the absurdity of this contention, let us assume that the Estate by reason of business depression or other causes had no income whatever during one entire year. The Taxpayer, nevertheless, would be absolutely entitled to the payment of his \$20,000 annuity. This would involve the invasion of principal with the unescapable conclusion that what was income so-called to the taxpayer was clearly not income to the Estate, but a part of the corpus. If the Commissioner's contention was sustained and an Income Tax imposed upon this annuity merely because in a given year it happened to be paid out of the income of the Estate, then it must logically follow that if James Gordon Bennett had made a gift of \$20,000 to the taxpayer during his lifetime, it would be taxable as income to the taxpayer if Mr. Bennett had paid it out of his own income and had not found it necessary to take it out of his principal. By the same theory if the executors used income to pay the debts of the Estate, the creditors thus paid would be subject to Income Tax because forsooth what was income to the Estate must be income to them. To state this argument in its logical applications is to refute it.

As a matter of fact, when a person receives interest on bonds or dividends on stock, the money thus received is income only at the moment of its receipt. Once it is reduced to possession it is just as much a part of the capital of the recipient as the bonds or stock which produced it. It is his to do with as he pleases. If he were to die, the Government would tax his cash in bank as his principal even though yesterday it had been received as income. So with the Estate of James Gordon Bennett. The executors have a certain corpus which under the Will belongs to the residuary legatee subject to the payment of annuities. **The entire estate is charged with those annuities—not simply the principal which he possessed at his death, but every and all increase or increment of that principal.** When that principal produces income, such income is received by the executors and the moment it is received it becomes in fact principal—part of the general fund or corpus in their hands which must be utilized by them to pay the annuities or to turn over to the residuary legatee as circumstances demand. For convenience of administration they may keep a separate account of the monies which come in or accrue upon the original corpus but that can in no way determine the character of the payments or distribution which the executors make. If that corpus produces an excess of \$50,000 after paying all annuities in any one year, that excess would be paid over to the residuary legatee or added to the corpus in accordance with the requirements of the Will. And if in the following year no income as such was produced and annuities were paid out of principal, could it be contended with any show of logic that what the annuitants received was income *pro tanto* the \$50,000 excess of the previous year?

The plain fact is that the manner in which the Executors or the estate pay the annuities is simply a mere

accident. It cannot be that their management of the estate will determine what is or is not income to the taxpayer. If that were the test, then the executors could at their pleasure make some of the annuities taxable to their recipients by paying the annuities in full out of income and render other annuities non-taxable by paying them out of principal. The net result to the annuitants would be exactly the same and nobody could criticize the action of the executors because they are at liberty to pay the annuities out of income or principal as they see fit. If the income in any one year were insufficient to pay all the annuities, then the executors could pay some of them out of that income and thus render them taxable to the recipients and pay the balance of them out of principal which would be non-taxable to the recipients. Therefore, there would be a shift about every year and income taxes would be imposed in one year on some annuitants and not on others; in some years on all the annuitants; in other years on none of the annuitants—and all the time the annuitants would be receiving exactly the same amounts under exactly the same instrument.

If the testator had bequeathed to the taxpayer the sum of \$100,000 outright, it could not be argued that, admitting it was a gift or bequest as far as the testator was concerned, it was nevertheless income to the recipient and taxable as such, unless we assume that the provision of the statute excluding the **value of bequests** from gross income is utterly devoid of meaning. It must be admitted that it would be a gift or bequest of principal to the recipient whether received in a lump sum or in installments and if the Revenue Act had attempted to tax it as income, it would be unconstitutional.

Eisner v. Macomber, supra.

It is impossible to see by what process of reasoning, legal or economic, a gift or bequest payable in any or all events and not out of the income of any fund designated for that purpose becomes income to the recipient solely by reason of the fact that it is payable in installments over a period of years.

Further emphasizing the point that a gift of an annuity does not resemble in any aspect a gift of income, we submit that the executors would have been within their legal rights in purchasing an annuity contract by appropriating from the Estate so much as would according to mortality principles provide the annuity of \$20,000. If they had adopted this measure the \$20,000 a year to the taxpayer would not have been taxable as income because Section 213 (b) (2) exempts such annuity to the extent that it represents a return of the principal sum. See Regulations 62, par. 47.

We are therefore confronted with the absurd contention that because the funds of the Estate were employed to discharge the annuities rather than to purchase an annuity contract that which was non-taxable as income under one method became taxable as such under another method, the net result to the recipient being identical in both cases. We cannot believe that the law could be predicated upon any such uncertain, unreliable and illogical distinction.

POINT III.

The bequest of \$20,000 a year to taxpayer does not constitute a trust, the income of which is distributable periodically.

The deficiency letter addressed to the taxpayer states that the sum of \$20,000 is taxable under Article 345 of Regulations 62. No other reason is assigned or suggested.

Turning to the Regulations, we find that Articles 341 to 348 are regulations governing estates and trusts. These regulations incidentally are mere expressions of opinion intended for the direction and guidance of those charged with the duty of applying and enforcing the statute as written. They cannot alter or modify the statute or impose a tax where the statute does not. It is still the function of the courts to construe the statute.

Appeal of Scripps, 1 B. T. A. 491, *Pitney v. Duffy*, 2 Fed. (2) 230;
Langstaff v. Lucas, 9 Fed. (2nd) 691;
Trinidad v. Sagrada Orden, etc., 263 U. S. 578.

Referring back to the statute itself which Articles 345, Regulations 62 is intended to explain or interpret, we find that Sec. 219 insofar as applicable to the question before us provides as follows:

“Sec. 219 (a) That the tax imposed by Sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust including * * *.

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, * * *

(d) In cases under Paragraph (4) of Subdivision (a), * * * the tax shall not be paid by the fiduciary, but there shall be included in computing the next income of each beneficiary *that part of the income* of the estate or trust for its taxable year which, *pursuant to the instrument or order governing the distribution is distributable to such beneficiary*, whether distributed or not, * * *”

In the present case there is no attempt to tax the income of an Estate. Consequently, the provisions of the Statute above quoted relating to the taxability of the in-

come of any kind of property held in trust is the only part of the statute which is applicable.

Turning to Article 345 of the Regulations, we read the following:

“Estates and trusts taxed to beneficiaries. In the case of (a) a trust the income of which is distributable periodically, * * * the income is taxable directly to the beneficiary or beneficiaries. Each such beneficiary must include in *his return his distributive share of the net income*, even though not yet paid him, * * *.”

The contention of the Commissioner, therefore, is that the sum of \$20,000 paid to taxpayer is the income of property held in trust which is distributable periodically and as such taxable directly to the beneficiary.

A gift of an annuity does not possess any of the elements of a trust.

In re Collins, 144 N. Y. Rep. 522; *In re Toms*, 84 N. Y. Misc. 312; *Peck v. Kinney*, 143 Fed. 76; 3 *Corpus Juris* 201.

The taxpayer has not been granted a life estate under the Will. He has not been designated as a *cestui que trust* to receive the income of a trust fund. No trust is created directly or by implication under the Will of James Gordon Bennett; no trustees are appointed by the Will. There is no direction to distribute *any income or share of income* periodically or otherwise to the taxpayer. The entire residue of the Estate has been bequeathed to the Memorial Home Corporation—not postponed as to enjoyment or possession but by a bequest *in praesenti*. Hence there is no justification for constructing a trust fund where the testator has not done so. That being the case, it is a mere fiction to call the tax-

payer's annuity the income of property held in trust distributable periodically.

Unless there is property held in trust there can be no occasion to resort to Section 219 of the Act and *a fortiori* no occasion for considering Article 345. We point with emphasis to the above quoted section 219 (a) (4) (d) wherein it is clearly pointed out that the only thing the beneficiary of the trust fund must report is "that part of the *income* of the Estate or Trust which *pursuant to the instrument* governing the distribution is distributable to such beneficiary."

Consequently we must look to the terms of the instrument which governs the distributions to taxpayer, viz., the Will of Mr. Bennett. That instrument does not direct the distribution of any "part of the income of the estate or trust." It follows, therefore, that what the taxpayer receives pursuant to that instrument is clearly outside the scope of the Section 219.

"Whatever the net income of the estate might have been in any one year, it is necessary to resort to the instrument containing the terms of the trust to determine her distributive share. *Therefore the distributive share which Congress must have had in mind and intended to be taxed was the distributive share of the income allotted to her under and in accordance with the terms of the trust.*"

Baltzell v. Mitchell, 3 Fed. (2), 428 at p. 431.

The Commissioner places his chief reliance upon the decisions of *Beatty v. Heiner* and *Irwin v. Gavit*. We shall examine these at length and demonstrate wherein they are not controlling in this appeal.

Beatty v. Heiner, 10 Fed. 2nd 390, revsd. 17 Fed. (2) 743; aff. 276 U. S. 598, involved the construction of the Will of Andrew Carnegie.

The Will of Andrew Carnegie contained the following clause:

“I give to each of the persons hereinafter in this Fifth Article named an annuity of the annual amount in this Fifth Article set after his or her name to be paid semi-annually during the annuitant’s life. * * * Mr. Beatty, \$5,000.”

The Will further directed the executor or trustee “either to set apart, hold in trust, invest and keep invested in separate funds one for each annuitant, sufficient sums to provide **by the clear net interest and income** thereof respectively the several annuities provided in the Fifth Article of this Will * * * and **to pay the several annuities from the interest and income** of the separate funds in semi-annual payments or to purchase such annuities in Life Insurance Companies in good standing in the City of New York or elsewhere. Upon the termination of each annuity, the principal of the fund held to produce such annuity shall be treated and disposed of as part of my residuary estate.”

The executor and trustee was also given discretion to retain any securities left by the testator for investment of the principal of any of the trusts. The executor elected to set aside certain securities belonging to the Estate, the income of which was sufficient to produce the annuity for Mr. Beatty. Mr. Beatty returned as income for the year 1920 the sum of \$5,000 received as the annuity, and action was brought to recover the amount of tax thereon upon the theory that the amount received was a gift or bequest not subject to Income Tax.

The District Court referred to the Act of 1918 as governing a determination of the question whether the annuity was taxable as income or not and quoted the definition of income under Section 213 (which is similar to the

1921 Act), then referring to the exemption from taxation under Section 213 of the value of property acquired by gift or bequest. The Court also pointed out that any doubt in the taxing statute should be resolved against the Government.

The Court then went on to point out the gift of the annuity was not the income of any particular fund: It was an outright gift and the duty of producing it devolved upon the executors and trustees as a matter of internal management of the estate. It held, therefore, that this annuity was a bequest of a fixed sum and not the income from a corpus, which was found to be taxable in *Irwin v. Gavit, infra*. The Circuit Court of Appeals, however, reversed and it is interesting to note the language of the opinion. The Court quotes the fifth article of the Carnegie Will (as we have quoted it above), and says:

“If the Will had stopped there, it is possible the testator’s provision for John W. Beatty would have been a bequest, payable in semi-annual instalments directly from the estate, and all payments made to him year by year would have been exempt from taxation under paragraph 3 of subdivision (b) of Section 213 of the cited Act. However, the Will did not stop there, but, going on, it provided in the very next article, by words whose significance we have emphasized in italics as follows:

‘Sixth: I direct my executor and *trustee* either to *set apart, hold in trust, invest and keep invested, in separate funds, one for each annuitant*, sufficient sums to *produce* by the clear net interest and *income* thereof respectively, the several annuities provided in the Fifth Article of this my Will, * * * and to pay the said several annuities *from the interest and income of the respective funds* in semi-annual payments, or to purchase such annuities in life insurance companies.’ * * *

The Court felt itself constrained to declare the annuities taxable under *Irwin v. Gavit* and we quote the language on which the decision is based:

“Recapitulating, these provisions created, somewhat inartificially, yet we think with no lack of certainty, *out and out trusts*. They provided a capital sum for each annuitant, directed that it be ‘set apart’, and ‘held in trust’ for him and that from the interest and income thereof accruing payments of a definite sum be made to him semi-annually. Having all the earmarks of formal trusts, the executor and trustee, believing itself charged therewith, exercised the election given to it to create capital trust funds by withdrawing from the body of the estate sufficient securities to produce the amounts to be paid annually to the more than forty annuitants. * * * Thus in both ways the testator willed that parts of the corpus of his estate be appropriated as capital sums from which income sufficient to pay the annuities could be obtained. In neither way—indeed, nowhere in the Will—did he provide for payment of annuities from the principal of his estate. * * * What the will intended the annuitant here to receive and what actually he did receive was *income* derived from a source which we think is sufficiently definite to fall within the statute’s denomination of ‘income derived from any source whatever’.”

The Supreme Court of the United States affirmed without further opinion on the authority of *Irwin v. Gavit*, *infra* (276 U. S. 598).

The distinguishing feature of the present case is very obvious. The truth is that the Will of Mr. Bennett stopped at the point which the Court said, in the foregoing extract, would make the annuity a non-taxable legacy. Mr. Bennett did not appoint any trustee; there was absolutely no reason for his doing so. He did not

authorize or direct the creation of any trust funds so as to produce sufficient income to meet the annuities. No trusts in fact have been set apart for such purpose. The very language of Mr. Bennett's Will (paragraph 30, Rec., pp. 11-12) empowered the executors to sell any part of his estate—not to provide *an income* to meet the annuities—but for the purpose of paying the annuities. He thus charged these annuities against the entire corpus of his estate.

The distinction is vital. It is impossible to bring the present case within the terms of the *Beatty v. Heiner* decision. Trust estates are recognized as separate entities and are subject to taxation under Section 219 of the Act. There are no trusts under Mr. Bennett's Will, and it is beyond the province of this Court to attempt to construct any trusts by implication. The law of the State of New York, to which these executors are subject, does not require any trust power for the proper execution of the Will as was said in *Clark v. Clark*, 147 N. Y., at page 644:

“A trust by implication involves a supposed intention to create one on the part of the testator, but I think cannot be raised where the Will expressly or explicitly negatives any such intention. * * *

It is then said that if there was no trust there was at least a power in trust. But no power as such was conferred or sought to be conferred. All that we find is a legacy of an annuity and a duty of paying it imposed upon executors, a duty which they were perfectly able to perform by force of their official character, as they were situated when the Will took effect. As there was no need to arm them with any additional power emanating from the testator, so none was created, and they were left as executors to pay the annuity to the legatee. That legatee of course took no life estate in the property held by the executors, as the appellant

further contends, but simply held the right to be paid the annuity out of the assets in their hands.”

In *United States v. Merriman*, 263 U. S. 179, the question arose as to whether a bequest made to an executor in lieu of all compensation or commissions to which he would be entitled as executor was exempt from taxation as a bequest or whether it was in reality compensation for services rendered and as such taxable. The Supreme Court of the United States did not indulge in any metaphysical distinction between a bequest and a right to a bequest. It did not hesitate to hold that the bequest mentioned in the Will was conditioned solely upon the executor clothing himself in good faith with the character of executor and such being the case, it was clearly a bequest exempt from all income tax. On behalf of the Government it was naively suggested that taxation was a practical matter concerning itself with the substance of the thing on which the tax was sought to be imposed rather than with legal forms and expressions. The Supreme Court rejected the suggestion by replying that it was compelled to adhere to the words of the statute.

In *Beatty v. Heiner*, *supra*, the District Court had before it and considered the decision of the Supreme Court of the United States in *Irwin v. Gavit*, 268 U. S. 161 and it did not feel that that decision was controlling on the facts there presented. The Circuit Court, however, felt that such decision was controlling, in view of the fact that there was present in both cases the same element of income from trust funds. A discussion of the case of *Irwin v. Gavit* will serve to illustrate wherein it differs from the present case. In that case it appeared that the Will of Anthony Brady had bequeathed the residue of his estate *in trust* to be divided into six equal parts, *the income of one part to be applied by the trustees*

to the support and education of his granddaughter during infancy and *any balance of income* not so applied to be divided into two equal parts and one of such parts paid to Mr. Gavit in equal quarterly payments during his life. The Supreme Court of the United States held that Mr. Gavit was subject to income tax on the amounts received pursuant to the above provisions. The decision clearly recognized the gift of a corpus as distinguished from the gift of an income and points out that the exemption granted in the Income Tax Act should be restricted to those gifts which are gifts of corpus to the recipient saying:

“But we think that the provisions of the Act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund.”

Getting down to the basis of the decision we find it embodied in this brief sentence:

“This is a gift from the income of a very large fund, *as income*.”

Consequently if there was no income there was nothing on which the bequest could operate: there was no bequest unless there was income from a specific trust fund.

In the present case we have the absolute gift of a definite sum each year to the taxpayer out of the estate, whereas in the *Gavit* case there was a gift of income and *income only* out of a particular fund designated and set apart for that purpose. There a trust fund was established to produce income; here we have no trust fund. In that case the trustees were limited strictly to pay out

income; here the executors must pay a definite sum annually whether there is any income or not. The amount payable in the *Gavit* case was entirely indefinite and uncertain depending upon numerous contingencies, but it was income only to which the taxpayer was entitled. Therefore what was income to the Brady Trustees was payable *as income* to Mr. Gavit; his sole interest and claim was in and to income as such. It was simply a gift of a life estate and an annuity, as in the present case, does not resemble a trust or a life estate.

And yet, notwithstanding those very important distinctions, it is interesting to note the contention of the taxpayer in the *Gavit* case that what he received was a bequest was sustained by the District Court, affirmed by the Circuit Court of Appeals and in the Supreme Court of the United States there was a very forceful and persuasive dissent by two of the Justices.

It might also be remarked that the Supreme Court of the United States laid considerable emphasis on the fact that the Congress had intended in the Income Tax Law to exercise its taxing power to the fullest extent and that if the sums paid to Mr. Gavit escaped taxation, then Congress had missed so much of the general purpose that it had in view in taxing income, *because under the 1913 act which was there construed there was no provision taxing the income of estates as such*. That basis of reasoning is entirely inapplicable to this appeal, since the statute controlling the question provides for the taxing of the income of estates.

The basis of the *Gavit* decision has been emphasized in *Drexel v. U. S.*, 61 Court of Claims 216, and *Verner v. U. S.*, Court of Claims, Nov. 8, 1926, where the Court points out that a gift of a fund for life and a gift of the income from it are not distinguishable and the mere intervention of trustees to administer the trust does not alter

the fact that in bequeathing a life estate, the testator in reality bequeathes income.

See also *Appeal of McConnell*, 3 B. T. A. 260, especially the concurring opinion of Mr. James.

We quote the following as further emphasizing the basis upon which *Irwin v. Gavit* was decided, as interpreted by the United States Board of Tax Appeals:

“The first question before us for decision is whether income received by a life tenant is a non-taxable legacy or bequest. That question was recently decided by the Supreme Court in *Irwin v. Gavit*, 268 U. S. 161, contrary to the taxpayer’s contention.

“In the present appeal, no evidence was introduced as to the terms of the Will or the nature of the taxpayer’s interest in the income. We have the mere statement that the interest was a life estate. Such evidence is insufficient as a basis for distinction from the decision of *Irwin v. Gavit*, *supra*.”

Appeal of Sophia G. Coxe, 5 B. T. A. 261.

POINT IV.

If the annuity to taxpayer is not excluded from taxation as property acquired by gift or bequest, then it still cannot be taxed as income unless it comes within one of the classifications of Section 217 (a), taxpayer being a non-resident alien.

In the case of a non-resident alien, gross income means only the gross income from sources within the United States, determined under the provisions of Section 217.

Section 213 (c); Regulations 62; Art. 92.

We have quoted at length the provisions of Section 217 (a) (*supra*, page 10). We shall not repeat them here,

except to point out that the annuity received by taxpayer obviously does not come within four of the five classes of income which are defined in Sec. 217. It is not

“(1) Interest on bonds, notes,” etc.

“(2) Amount received as dividends,” etc.

“(3) Compensation for labor,” etc.

“(5) Gains, profits and income from the sale of real property,” etc.

The only point which merits any consideration is the suggestion that it might come within class (4) which covers—

“Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States patents, copyrights, secret processes and formulas, good-will, trade marks, trade brands, franchises and other like property.”

We have already demonstrated that the taxpayer has no interest in any specific property, such as might have been the case in *Irwin v. Gavit*, *supra*. Moreover, a reading of subdivision (4) shows clearly that the “interest” in property which is included in gross income is a fixed interest, such as arises from contractual arrangements, as is evidenced by the nature of the enumeration contained in that subdivision, *e. g.* rentals and royalties from patents, trade-marks, etc.

We wish to point out that there is no basis for an argument under Section 221 (a), which requires all individuals

“having the control, receipt, custody, disposal or payment of interest * * * rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable

annual or periodical gains, profits and income, of any non-resident alien * * *,”

to deduct and withhold the tax thereon. It might be urged that the inclusion of the word “annuities” indicates that they are subject to tax.

The answer to this suggestion is found, not only in the very language of the section—which cannot possibly be read so as to require the retention of a tax on something which is not taxable—but also in the provision of Article 362, Regulations 62, which clearly states that

“only (a) fixed or determinable (b) annual or periodical *income* is subject to withholding.”

The obvious interpretation of this provision is that it is only an annuity subject to income tax which is subject to the withholding clause. And we are thrown back to the previous sections of the act to determine whether an annuity is subject to tax or not.

CONCLUSION.

The appeal should be dismissed and the determination of the Board of Tax Appeals affirmed.

Respectfully submitted,

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